CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. [illegible] 183

UNION PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

JAMES J. E. BURKE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

[illegible]

(27,983)

(27,323)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 568.

UNION PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

JAMES J. E. BURKE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 11, 1920.

COURT OF APPEALS.

STATE OF NEW YORK.

Pleas in the Court of Appeals held at Court of Appeals Hall in the City of Albany on the 15th day of July in the year of our Lord one thousand nine hundred and nineteen before the Judges of said Court.

Remittitur, July 16, 1919.

Witness,

THE HON. FRANK H. HISCOCK,
Chief Judge presiding,
R. M. BARBER, Clerk.

Order of Court of Appeals.

JAMES J. E. BURKE,

Appellant,

—against—

UNION PACIFIC RAILROAD COMPANY,

Respondent.

BE IT REMEMBERED that on the 3rd day of January in the year of our Lord one thousand nine hundred and eighteen JAMES J. E. BURKE, the appellant in this cause came here into the Court of Appeals, by Tipple & Plitt, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in

4-a *Order of Court of Appeals.*

and for the First Judicial Department. And Union Pacific Railroad Company, the respondent in said cause afterwards appeared in said Court of Appeals by Harrington, Bigham & Englar, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Arthur W. Clement of Counsel for the Appellant and by Mr. Oscar R. Houston, of counsel for the respondent
5-a and after due deliberation had thereon did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and judgment granted in favor of plaintiff and against defendant for the sum of $17,549.01 with interest from March 10, 1915, with costs in this Court as in the Appellate Division.

And it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according
6-a to law.

Therefore it is considered that the said judgment be reversed and judgment granted in favor of plaintiff, etc., as aforesaid.

And hereupon as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted into the Appellate Division, First Judicial Department, before the justices thereof, ac-

cording to the form of the statute in such case made and provided to be enforced according to law and which record now remains in the said Apellate Division before the justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.
Albany, July 16, 1919.

8-a

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein attached thereto.

R. M. BARBER,
Clerk.

[SEAL]

9-a

1

Supreme Court,

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES J. E. BURKE,

Plaintiff,

—against—

2

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Statement Under Rule 41.

This action was begun by the filing of the case, submission and affidavit in the office of the Clerk of the County of New York on the 18th day of January, 1917, pursuant to Section 1280 of the Code of Civil Procedure. The names of the original parties are James J. E. Burke, plaintiff, and Union Pacific Railroad Company, defendant. There have been no changes of parties or attorneys.

3

NEW YORK SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Agreed Statement of Facts.

The above-named plaintiff, of full age, a citizen of the United States, and a resident of the County of New York, and above-named defendant, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, hereby, for the purposes of this action and submission only, agree upon the following facts upon which the controversy between them depends and hereby submit the same to this Court for decision:

I. At all the times hereinafter mentioned the defendant was a common carrier for hire engaged in the transportation of property.

II. On or about March 10th, 1915, at Yokohama, Japan, a foreign country, the firm of S. Ontra & Brother delivered to the Pacific Mail Steamship Company for transportation, certain property consisting of 56 cases drawn work goods and Renaissance consigned to New York, New York, to be there delivered to the shippers' order, notifying S. Ontra & Brother, 425 Broadway, New York, and at said time and place of shipment the Pacific Mail Steamship Company deliv-

ered to said S. Ontra & Brother, a bill of lading, a copy of which is attached hereto, marked Exhibit A, and made a part hereof, which was duly accepted by S. Ontra & Brother.

III. At said time and place of shipment no freight was paid upon said shipment but said bill of lading Exhibit A shows as collect freight the sum of $507.02, made up as follows: *Ocean freight* at the rate of 50 cents per hundred pounds based on the weight of said shipment of 26,404 pounds or a total of $132.02, ocean freight from Yokohama to San Francisco, and *rail freight* at the rate of $1.25 per hundred pounds, based upon a minimum carload weight of 30,000 pounds, or a total of $3.75 rail freight, from San Francisco to New York.

IV. Thereafter said Pacific Mail Steamship Company duly transported said property to the Port of San Francisco, California, a port of entry in the United States where it delivered said property to the Southern Pacific Company, a common carrier, and said Southern Pacific Company thereupon transported said property to its point of Junction with defendant's line, at which place it delivered said property to the defendant.

V. At said time and place, the defendant duly accepted and received said property as a common carrier for hire and as the next connecting carrier and the defendant then undertook and agreed to transport said property from the point at which it received the same as such connecting carrier as far towards New York as defendant's railroad extended, and to then and there deliver

10 *Agreed Statement of Facts.*

the same to the next connecting carrier on the route to New York.

VI. The whole of said property to wit: Said fifty-six original cases and their contents was totally destroyed at or near Rawlins, Wyoming, while said property was in the hands of the defendant, as a carrier as above set forth and was wholly lost to said firm of S. Ontra & Brother, the owner thereof, and was never received or delivered at New York.

11

VII. Said fifty-six cases contained at the time of their said loss a quantity of drawnwôrk and Renaissance of the fair, reasonable invoice and market value of $17,549.01 and the property of S. Ontra & Brother.

VIII. At all the times hereinbefore mentioned the defendant and the Southern Pacific Company and other carriers duly published and established in accordance with the Interstate Commerce Act and duly filed with the Interstate Commerce Commission at Washington, D. C., certain classi-
12 fications, tariffs and schedules of rates, copies of the material parts of which are hereto annexed, marked Exhibit B, and made a part hereof, which said classifications, tariffs and schedules were in full force and effect at all the times hereinbefore mentioned.

IX. Thereafter and prior to the commencement of this action, said firm of S. Ontra & Brother for a valuable consideration and by an instrument in writing duly assigned to one Douglas F. Cox, of West Orange, New Jersey, any and

all claims and rights of action arising out of the facts above set forth and thereafter and prior to the commencement of this action, said Douglas F. Cox, for a valuable consideration and by an instrument in writing duly assigned to the plaintiff above named any and all claims and rights of action arising out of the facts above set forth and the plaintiff is now the owner of all claims and rights of action arising out of the facts above set forth.

X. The plaintiff claims upon the foregoing 14
facts he is entitled to recover judgment for $17,549.01 with interest from March 10th, 1915, and the defendant claims that upon the foregoing facts the plaintiff is entitled to recover only $5,600, with interest from March 10, 1915.

XI. The controversy hereby submitted for decision is whether or not upon the foregoing facts the plaintiff is entitled to judgment for $17,549.01 with interest from March 10th, 1915, or whether the plaintiff is entitled to judgment, only for $5,600, with interest from March 10, 1915.

XII. The parties agree that the Court shall 15
render such judgment as shall be proper upon the above facts.

JAMES J. E. BURKE,

Plaintiff.

UNION PACIFIC RAILROAD COMPANY,
By C. C. Stillman,

Defendant.

(Seal.)
Attest,
Alex. Millar,
Secretary.

16 *Agreed Statement of Facts.*

State of New York,
County of New York—ss.:

On this 9th day of January, 1917, before me personally appeared James J. Burke, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

ADOLPH HANSEN,
Notary Public,
17 Kings County, No. 186.
Certificate filed in New York County.

State of New York,
County of New York—ss.:

On the 17th day of January, in the year 1917, before me personally came C. C. Stillman to me known, who, being by me duly sworn, did depose and say, that he resided in the City of New York, County of New York and State of New York; that he is the vice president of the Union Pacific Railroad Company, the corporation described in
18 and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Executive Committee of said corporation, and that he signed his name thereto by like order.

E. E. CABLE,
Notary Public,
Kings Co.
Certificate filed in New York Co.

(Seal.)

Affidavit of James J. E. Burke.

61

NEW YORK SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

62

State of New York,
County of New York—ss.:

James J. E. Burke, being duly sworn, says: I am the plaintiff above-named; the controversy mentioned in the foregoing case and dependent upon the facts stated herein and herewith submitted to the Supreme Court of the State of New York, Appellate Division, First Department, for decision thereof is real and the submission thereof is made in good faith for the purpose of determining the rights of the parties.

63

JAMES J. E. BURKE.

Sworn to before me this
9th day of January, 1917.

Adolph Hansen,
Notary Public,
Kings County.

Certificate filed in New York County, No. 186.

64

Stipulation.

It is hereby stipulated that the foregoing case, submission and affidavit are true copies of the originals on file in the office of the Clerk of the County of New York and certification thereof is hereby waived.

Dated, February 2nd, 1917.

TIPPLE & PLITT,
Attorneys for Plaintiff,

65

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Defendant.

66

Order of Appellate Division.

At a Term of the Appellate Division of the Supreme Court, for the First Department, held at the Appellate Division Court House, County of New York, on the 13th day of July, 1917.

Present: Hon. John Proctor Clarke, P. J.
Hon. Frank C. Laughlin,
Hon. Francis M. Scott,
Hon. Vernon M. Davis,
Hon. Clarence J. Shearn, J. J.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

A case agreed between the parties above named and duly executed and acknowledged by the plaintiff on the 9th day of January, 1917, and by the defendant on the 17th day of January, 1917, having been filed in the office of the Clerk of the County of New York on the 18th day of January, 1917, and having been submitted to this Court, Now, after hearing Arthur W. Clement, Esq., of counsel for the plaintiff, and Oscar R. Houston,

70 *Order of Appellate Division.*

Esq., of counsel for the defendant, and due deliberation having been had thereon, it is

On motion of Harrington, Bigham & Englar, attorneys for the defendant,

Ordered, unanimously that the plaintiff have judgment against the defendant for the sum of five thousand six hundred dollars ($5,600), with interest from March 10th, 1915, less the defendant's taxable costs and disbursements which are hereby awarded to the defendant.

71 Enter, J. P. C.

Opinion.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

---

72 Submission of controversy upon an agreed state of facts between James J. E. Burke and the Union Pacific Railroad Company. Judgment for plaintiff.

Argued before Clarke, P. J., and Laughlin, Scott, Davis and Shearn, JJ.

Arthur W. Clement, of New York City (Wilson E. Tipple, of New York City, on the brief), for plaintiff.

Oscar R. Houston, of New York City, for defendant.

SCOTT, J.:

The only question at issue in this controversy is the amount of damages which the plaintiff is entitled to recover for the loss of certain goods shipped from Japan to this country and then transported over defendant's railroad. The liability of defendant is not questioned; the only dispute being as to the amount for which it is liable.

The goods, consisting of 36 cases of merchandise, were shipped from Yokohama, Japan, by 74
the Pacific Mail Steamship Company, to be delivered at New York to the shipper's order. It was carried by the steamship company to San Francisco, and there delivered to the Southern Pacific Company, a common carrier, and by that company transported to its junction with defendant and there delivered to said defendant. While in defendant's hands the property was totally destroyed. As has been said, the defendant concedes its liability, and it is stipulated that the fair, reasonable, and market value of the goods was $17,549.01, for which sum, with interest, the 75
plaintiff demands judgment.

The defendant claims, however, that it is liable for no more than $5,000, with interest. This claim is based upon a clause in the bill of lading issued by the steamship company reading as follows:

"It is expressly agreed that the goods named are hereby valued at not exceeding $100 per package, and, unless a different or other value is expressly written or declared herein, the liability of the companies therefor, in case of the total

76 *Opinion of Appellate Division.*

loss of all or any of the said goods from any cause, shall not exceed $100 per package, and in case of the partial loss or of damage to any of said goods, the liability of the carriers shall not exceed such proportion thereof per package as the loss or damage on each package shall bear to the sum of $100."

This is a very common form of agreement as to value, and has frequently been upheld and enforced (Hart v. Penn. R. R. Co., 112 U. S. 331;
77 Greenwald v. Barrett, 199 N. Y. 170), and it is of no moment that the freight charges do not appear to have been based on this valuation of $100 per package (Reid v. Fargo, 213 Fed., 771-773; affirmed on this point, 241 U. S. 544-551).

It is also apparent that this agreement as to value was intended to apply to any of the successive carriers. The bill of lading was denominated "through bill of lading," and it called for the transportation of the goods "from Yokohama, via San Francisco, to New York." The freight charge was made up of two items, one the ocean rate, and the other the rail rate, and the bill of
78 lading provided that the goods were

"to be transported by the Pacific Mail Steamship Company on board the steamship 'Persia' * * * from Yokohama unto the port of San Francisco, or as near thereto as safe navigation of such vessels shall then permit, * * * and there upon the arrival of said steamer in like condition to be received by and delivered unto the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, or the Western Pacific Railway Company, or any of them, and thence to be

transported by said company and connecting railroad companies to New York, and there in like condition to be delivered unto * * * order."

And finally the clause fixing the valuation of $100 per package (quoted above) speaks of the liabilities of the "companies," and later of the "carriers," which it would not have done, if it had been intended to limit the effect of the stipulation as to value to the first carrier, viz: the steamship company.

80 The plaintiff, however, contends that, in so far as concerns the transportation of the goods from San Francisco to New York, the shipment must be regarded as being governed exclusively by the provisions of the defendant's filed classifications, tariffs, etc., and the uniform bill of lading on file with the Interstate Commerce Commission, and that since the limitation upon the defendant's liability, contained in the steamship company's bill of lading, is not to be found in any of the classifications, tariffs, or in the uniform bill of lading, the defendant may not avail itself of the agreement as to value. We have no doubt that 81 the Interstate Commerce Act applied to so much of the shipment as was had by rail after the goods had been landed at San Francisco (see Section 1), and inasmuch as the shipper gave no notice that he elected to ship subject to the common law rules of liability, the shipment, so far as concerns defendant, must, we think, be deemed to have been made under the filed classifications and rates and under the terms of the uniform bill of lading, notwithstanding no such

82 *Opinion of Appellate Division.*

bill was in fact ever issued or signed (see Rule 9 of Western Classification No. 3, in force at the time of the shipment and stipulated as a part of the submission). In other words an interstate shipment, whether originating in this country or abroad, is controlled, so far as concerns that portion of the transportation which is interstate, by the Interstate Commerce Law, and the rules, forms of contract, and classifications established in pursuance of that law.

83 Granting this, however, does not serve to sustain the plaintiff's claim. While the filed schedule of classifications, rates, etc., do not in terms provide for such a valuation as was made in this case, and a consequent limitation of the carrier's liability, they do not forbid it. The uniform bill of lading, however, does explicitly so provide. Its third section reads as follows:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges if prepaid) at the place
84 and time of shipment under this bill of lading, *unless a lower value* has been represented in writing by the shipper or *has been agreed upon* or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

This section establishes four alternative measures of value or bases of liability. The first is the invoice value, and the third is "a lower value

agreed upon." The shipment for the loss of which plaintiff seeks to recover damages falls distinctly within this third class. A lower value than the invoice price had been distinctly agreed upon between the initial carrier and the shipper, and had been expressed in the bill of lading. Since, as already said, that agreement was obviously made, not only for the benefit of the initial carrier, but for that of each successive carrier, the defendant is entitled to the benefit of it, precisely as if a bill of lading in the uniform 86
form had been issued, and the agreement as to value had been written into it.

It follows that there must be judgment for the plaintiff for $5,600, with interest, with costs to the defendant. All concur.

87

88

Judgment.

SUPREME COURT,

NEW YORK COUNTY.

NEW YORK COUNTY,

JAMES J. E. BURKE,

Plaintiff,

—against—

89

UNION PACIFIC RAILROAD COMPANY,

Defendant.

A case agreed between the parties above-named and duly executed and acknowledged by the plaintiff on the 9th day of January, 1917, and by the defendant on the 17th day of January, 1917, having been filed in the office of the Clerk of the County of New York on the 18th day of January, 1917, and having been submitted to the Appellate Division of the Supreme Court, for
90 the First Department, and said Appellate Division having duly rendered its decision thereon, and an order having been duly made and entered in the office of the Clerk of said Appellate Division on July 13th, 1917, ordering, adjudging and decreeing that the plaintiff have judgment against the defendant for the sum of five thousand six hundred dollars ($5,600), with interest from March 10th, 1915, less the defendant's taxable costs and disbursements which are hereby awarded to the defendant, and a certified copy

 91

of said order having been duly filed in the office of the Clerk of this Court on the 23rd day of July, 1917, and the costs and disbursements of the defendant having been regularly taxed by the Clerk of this Court at the sum of fifty-three and 92/100 ($53.92) dollars,

Now, on motion of Harrington, Bigham & Englar, attorneys for the defendant, it is

Ordered, adjudged and decreed that the plaintiff James J. E. Burke have judgment against 92
the defendant Union Pacific Railroad Company for the sum of fifty-six hundred dollars plus $803.64 dollars interest in all $6,403.64 dollars less $53.92 dollars costs of the defendant, or a total of $6,349.72 in favor of the plaintiff and that he have execution therefor.

Judgment this 31st day of July, 1917.

WM. F. SCHNEIDER,
Clerk.

93

94 **Order Granting Leave to Appeal.**

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department, in the County of New York, on the 11th day of October, 1917.

Present: Hon. John Proctor Clarke,
Presiding Justice.
" Francis M. Scott,
" Victor J. Dowling,
" Walter Lloyd Smith,
" Alfred R. Page,
95 Justices.

JAMES J. E. BURKE,
Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,
Defendant.

The above-named plaintiff having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 23rd day of July, 1917.

96

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Arthur W. Clement in support of said motion, and after hearing Mr. Arthur W. Clement for the motion,

It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

Enter, J. P. C.

Notice of Appeal.

SUPREME COURT,

NEW YORK COUNTY.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Please take notice that pursuant to leave granted by an order of the Appellate Division, First Department, dated October 11th, 1917, James J. E. Burke, the above-named plaintiff, hereby appeals to the Court of Appeals from the order of the Appellate Division, First Judicial Department, made and entered herein on the 13th day of July, 1917, directing that judgment be entered herein in favor of the plaintiff and against the defendant for the sum of five thousand six hundred dollars and interest less the defendant's costs herein, and from the judgment entered herein pursuant to said order in the office of the Clerk of the County of New York on the 31st day of July, 1917, in favor of the plaintiff and against the defendant in the sum of six thousand three hundred forty-nine and 72/100 dollars ($6,349.72) and said plaintiff ap-

100 *Notice of Appeal.*

peals from each and every part of said judgment and order as well as from the whole thereof.

TIPPLE & PLITT,
Attorneys for Plaintiff,
No. 150 Nassau Street,
Borough of Manhattan,
New York City.

To:
Harrington, Bigham & Englar, Esqs.,
Attorneys for Defendant,
101 No. 64 Wall Street,
New York.

Stipulation.

It is hereby stipulated that the foregoing are true copies of the case, submission and affidavit, of the opinion and order of the Appellate Division of the First Department, of the judgment entered thereon, of the order granting the plaintiff leave to appeal therefrom, and of the notice of appeal therefrom on file in the office of the
102 Clerk of the County of New York; and

It is further stipulated, that the same shall constitute the record of the Court of Appeals for the hearing of the appeal herein and certification thereof is hereby waived.

Dated, January 3rd, 1918.

TIPPLE & PLITT,
Attorneys for Plaintiff-Appellant.

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Defendant-Respondent.

Clerk's Certificate.

APPELLATE DIVISION
OF THE
SUPREME COURT,
FIRST JUDICIAL DEPARTMENT,
Clerk's Office,
NEW YORK COUNTY.

JAMES J. E. BURKE,
Appellant,

—VS.—

UNION PACIFIC RAILROAD COMPANY,
Respondent.

I, ALFRED WAGSTAFF, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy, Remittitur from Court of Appeals, has been compared with the original thereof filed in this office on the 28th day of July, 1919, and that the same is a correct transcript thereof, and of the whole of the said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 1st day of October, 1919.

(Seal.)

ALFRED WAGSTAFF,
Clerk.

106 **Opinion.**

State of New York,]
Court of Appeals, } ss.:
State Reporter's Office,]

I, J. NEWTON FIERO, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of JAMES J. E. BURKE, Appellant, against UNION PACIFIC RAILROAD COMPANY, Respondent, decided by the Court of Appeals on the Fifteenth day of July, 1919, with
107 the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 30th day of September, 1919.

J. NEWTON FIERO,
As Reporter of the Court of Appeals
of the State of New York.

108

ATTEST:

(L. S.) R. M. BARBER,
Clerk of the Court of Appeals.

(Seal.)

State of New York,
Court of Appeals.

I, FRANK H. HISCOCK, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that Richard M. Barber is the clerk of said Court, having custody of the seal of said Court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said Court, having custody of the official opinions, written 110
and handed down by said Court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of James J. E. Burke, appellant, against Union Pacific Railroad Company, Respondent, decided by the said Court of Appeals on the fifteenth day of September, 1919, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the
seal imprinted thereon is the true and genuine 111
seal of the said Court of Appeals, and that the signature of Richard M. Barber, as clerk of said Court, appended thereto is the true and genuine signature of said Richard M. Barber, and the signature of J. Newton Fiero, as reporter of said Court, appended thereto is the true and genuine signature of said J. Newton Fiero.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature at the Chambers of

112 *Opinion.*

said Court at the Court of Appeals Hall, in the City of Albany and State of New York, on the 30th day of September, in the year One thousand nine hundred and nineteen.

FRANK H. HISCOCK,
As Chief Judge of the Court of Appeals of the State of New York.

---

113 JAMES J. E. BURKE, Appellant, *v.* UNION PACIFIC RAILROAD COMPANY, Respondent.

(Decided July 15, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 31st, 1917, in favor of plaintiff, upon the submission of a controversy pursuant to section 1279 of the Code of Civil Procedure.

The nature of the action and the facts, so far
114 as material, are stated in the opinion.

Arthur W. Clement for the appellant.
Oscar R. Houston for the respondent.

COLLIN, J. The plaintiff, in virtue of an assignment vesting in him the right, seeks to recover the sum of the invoice price of value of goods destroyed while in the possession of the defendant as a common carrier, to wit, the sum of $17,549.01. The defendant, conceding a liability, asserts that, because of the agreed valuation of

the goods and a corresponding limitation, it does not exceed the sum of $5,600. The Appellate Division gave the plaintiff judgment for the latter sum, with interest.

The goods, consisting of fifty-six cases, were delivered, March 10, 1915, at Yokohama, Japan, to the Pacific Mail Steamship Company for transportation to New York City, to be there delivered to the shippers' order. A bill of lading was then and there delivered by the company to and accepted by the shippers. It contained the provision: "It is expressly agreed that the goods 116
named in this Bill of Lading are hereby valued at not exceeding $100.00 per package, and unless a different or other value is expressly written and declared herein, the liability of the Companies therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed $100.00 per package, * * *." It did not express or declare a different value. The goods at San Francisco were by the company delivered to the Southern Pacific Company, as a connecting carrier, which delivered them to the defendant, as a connecting carrier, and were 117
totally destroyed while being transported by the defendant. Their invoice value was $17,549.01. No part of the freight was paid. We are to determine whether or not the liability of the defendant is limited by the agreed valuation.

The Southern Pacific Company, the defendant and the other inland carriers were, of course, subject to the federal act to regulate commerce, and had duly established and filed with the interstate commerce commission certain classifications, tariffs and schedule of rates which were

applicable to the transportation from San Francisco to New York City. (*Armour Packing Co.* v. *United States*, 209 U. S. 56, 77.) The transportation from San Francisco being interstate, the laws of Congress and the decisions of the United States Supreme Court, are, of course, so far as applicable, binding. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Chicago, Burlington & Q. Ry. Co.* v. *Miller*, 226 U S. 513.) The Carmack Amendment of January 29, 1906, declared that any common carrier receiving property for transportation from a point in one state 119 to a point in another state shall issue a receipt or bill of lading therefor, and denied to an initial carrier the former right to make a contract limiting its liability to its own line. Beyond controversy transportation by ocean carriers between the United States and non-adjacent foreign countries is not included in or affected by the act to regulate commerce and the jurisdiction of the interstate commerce commission or the classification and schedule of rates and charges pursuant to the act, cannot extend to carriers engaged in that transportation. (*Cosmopolitan* 120 *Shipping Co.* v. *Hamburg-American Packet Co.*, 13 Interstate Com. Commission Rep. 266; *Chamber of Commerce of N. Y.* v. *N. Y. C. & H. R. R. Co.*, 24 Interstate Com. Commission Rep. 55.) Interstate rates and charges to and from ports of entry must be published and filed as independent from the ocean transportation. Ocean transportation may be conducted under through bills of lading, issued at a foreign port, but the classifications and schedules of rates and charges of the inland carrier or carriers must be

limited to inland transportation and services 121
and cannot relate to liability, service or obligation of the ocean carrier. (*Armour Packing Co. v. United States*, 209 U. S. 56, 77; *Pacific Mail S. S. Co. v. Western Pacific R. Co.*, 251 Fed. Rep. 218.)

The bill of lading delivered by the steamship company was a through bill, issued, manifestly, in arrangement with and in the behalf of the inland connecting carriers. The rate for the inland transportation was stated in it separately from that of the ocean transportation and as one hundred and twenty-five cents per one hun- 122
dred pounds in minimum carloads of thirty thousand pounds. Such was the rate fixed for the inland transportation by the classifications and schedule of rates and charges established and duly filed by the inland carriers. The bill of lading contained this clause: "In consideration of the rate of freight herein named it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, on the face and on the back hereof, and said conditions are hereby agreed to by the shipper and by him accepted for him- 123
self and assigns as just and reasonable." The agreed valuation of the goods at one hundred dollars per package and limiting the liability of the companies to a sum not exceeding that valuation was a condition of the bill. The filed classifications and schedules did not contain an agreed valuation, controlling in form, the shippers' recovery in case the goods were lost, similar to that I have quoted from the bill of lading. No bill of lading other than that delivered to the shippers by the steamship company was issued.

124 The permissibility of limiting the recovery, in case of liability, to a valuation of the freight agreed upon or declared by the shipper is conclusively estabished. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U. S. 173; *D'Utassy* v. *Barrett*, 219 N. Y. 420; *Boyle* v. *Bush Terminal R. R. Co.*, 210 N. Y. 389.) The Cummins Amendment relating to the permissibility need not be heeded here because it was not effective prior to June 2, 1915, and the goods were shipped March 10, 1915. The permissibility must, how-
125 ever, be shown or declared by the established and filed classifications and schedule of rates and charges and in accordance with them invoked and executed. (*Southern Ry. Co.* v. *Prescott*, 240 U. S. 632.)

The liability of the defendant is not and, under the Carmack Amendment, could not be questioned. (*Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31.) The plaintiff asserts and argues that the agreed valuation in the instant case, if there was an agreed
126 valuation, was not valid and effective, because the charge made for the inland transportation was not based upon the agreed valuation. The plaintiff states in his brief: "It is a fixed requirement of all the Federal decisions that an 'agreed valuation' to be valid must be supported by a freight rate based upon it, or, in other words, the shipper must have obtained a lower freight rate in consideration of agreeing to the limited valuation of his shipment." In judicial opinion and decisions there is support for the

assertion of the appellant. In a leading case 127
(*Hart* v. *Penn. R. Co.*, 112 U. S. 331) the plaintiff, a shipper, sought to recover of the defendant, a carrier, the market value of horses killed or injured in transportation under a bill of lading containing an agreed valuation as the extent of liability. The Court said: "It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the 128
agreed valuation named, the rate of freight is graduated by the valuation. * * * The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which 129
the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." The doctrine that an agreed valuation, when made the basis for a rate, is given effect in measuring the damages and limiting the shipper's recovery, was not abrogated or changed by the Carmack Amendment. (*American Express Co.* v. *United States Horse Shoe Co.*, 244 U. S. 58, 62; *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278; *Kansas City*

130 *So. Ry. Co.* v. *Carl*, 227 U. S. 639; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Chicago R. I. & Pac. Ry. Co.* v. *Cramer*, 232 U. S. 490; *Western Transit Co.* v. *Leslie & Co.*, 242 U. S. 448; *Boyle* v. *Bush Terminal R. R. Co.*, 210 N. Y. 389; *D'Utassy* v. *Barrett*, 219 N. Y. 420; *Moore* v. *Duncan*, 237 Fed. Rep. 780.) Stipulations for an agreed value, when made the basis for the rate, are not agreements for exemptions from negligence and are given effect upon the ground of estoppel. (*Boston & Maine Railroad* v. *Piper*, 246 U. S. 439; *D'Utassy* v. *Barrett*, 219 N. Y. 420.)

131 The validity of a contract limiting the carrier's liability to an agreed valuation does not depend upon the relation of that value to the actual value. It rests upon the proposition that, by freely and deliberately electing to contract for carriage at a rate of compensation based upon an agreed value, the shipper is estopped to claim a higher value in case the shipment is lost or destroyed. (*Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 283; *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639; *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439.) Under this proposition and the authorities the agreed or released

132 valuation is valid and effective as the extent of a loss only when it is related to the rate charged for transportation. The shipper cannot be estopped by an agreement or declaration concerning value which in no way or extent effect the tariff or conduct of the carrier. The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of the agreed valuation limitation and relief from full liability. (*Cincinnati, New Orleans & Texas Pac. Ry.* v. *Rankin*, 241 U. S. 319, 327.)

We are thus brought to the ultimate and determinative question whether or not the facts in the case at bar disclose a relation between the agreed valuation and the rate charged. The bill of lading declared in the parts we have already quoted a relation, that is, in consideration of the rate of freight the valuation is agreed upon as a condition of the transportation. It fulfilled the requirement of the Carmack Amendment that the initial carrier shall issue a bill of lading. It contains agreements of the parties, intended manifestly to bind the connecting carriers, and 134
it and the filed classifications and schedules constitute the entire contract under which the inland or rail transportation is performed. Any provision in it inconsistent with a content of the classifications or schedules is void. It is not now open to discussion that the duly established and filed rates are absolutely binding upon all persons who are parties to a contract of interstate transportation. They have the force of a statute. They cannot be varied under any pretext. No party can lawfully depart from them (*Louisville & Nashville Railroad* v. *Maxwell*, 237 U. S. 94, 97; *Dayton Coal & Iron Co., Ltd.*, v. *Cincinnati, New Orleans & Texas Pac. Ry.*, 239 U. S. 446; *Erie Railroad Co.* v. *Stone*, 244 U. S. 332.) The filed classifications and schedules did not sanction the right of the parties to fix the agreed valuation as a limitation upon the extent of the liability of the connecting carriers. By force of provisions of the classification, which need not here be set out at length, the uniform bill of lading, "Straight," was a part of the classification and related to and governed the terms of the transportation eastward from San

Francisco. The classification created, in effect, the alternatives of shipping from San Francisco under (a) the straight uniform bill of lading at the rate and upon the conditions named in it, or (b) "the liability imposed upon common carriers by common law and the federal and state statutes applicable thereto, * * * and the rate charged therefor will be ten per cent. (10%) higher (subject to a minimum increase of one (1) cen. per hundred pounds) than the rate charged for property shipped subject to all the terms and conditions of the Uniform Bill of Lading." The uniform bill of lading, under which, as we have stated, the goods moved from San Francisco, provided: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona-fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." It fixed the one rate of one hundred and twenty-five cents per one hundred pounds, carload lots of minimum of thirty thousand pounds, that is the same rate as was fixed by the original bill of lading. A lesser rate for a valuation less than "the value of the property being the *bona-fide* invoice price, if any, to the consignee, including the freight charges, if pre-

paid at the place and time of shipment under this bill of lading" was not prescribed or presented to the shipper. There was not a rate adjustable to the agreed valuation in the original bill of lading. There was no relation between that valuation and the rate fixed in the uniform bill of lading and the original bill of lading. The agreed valuation worked no change in the situation of the connecting carriers. The rate was made relative to another and different valuation, namely, the valuation prescribed in the uniform bill of lading. There was neither two or more 140
rates based upon valuation nor the opportunity for a valuation by the shipper for the purpose of the rate and the liability. In this it differs from the case of *Cleveland, Cincinnati, Chicago & St. Louis Ry.* v. *Dettlebach* (239 U. S. 588) in which the trial court found as a fact that the shipper by consenting to the limited valuation received a consideration in the shape of a substantial reduction in the freight rate. While the provision of the straight uniform bill of lading we have quoted declared that an agreed lower valuation shall be the maximum amount to 141
govern the computation of any loss or damage a lower rate is not offered to or obtainable by the shipper because of it. There is not the basis of an estoppel as against him. Under the principle and authorities we have stated the plaintiff was entitled to recover the invoice value of the goods.

We find nothing relevant to this phase of the problem in the case of *Reid* v. *Fargo* (213 Fed. Rep. 771; 241 U. S. 544), upon which the respondent relies. There was there no interference,

through classification or schedules, with the initial and only bill of lading. Ocean transportation alone was involved. The bill of lading declared: "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency, on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid." Proof in
143 contradiction of this statement was not offered. Where a bill of lading duly delivered and accepted declares that lawful alternate rates based on specific values were offered, such declaration constitutes an admission by the shipper and sufficient *prima facie* evidence of choice. (*Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319.)

The judgment should be reversed and judgment rendered in favor of the plaintiff and against the defendant for the sum of seventeen thousand, five hundred and forty-nine dollars
144 and one cent, with interest from March 10, 1915, with costs in this court and in the Appellate Division.

CHASE, CUDDEBACK, MCLAUGHLIN and ANDREWS, JJ., concur; HOGAN, J., dissents; CRANE, J., not sitting.

Judgment accordingly.

Order of Appellate Division

At a Term of the Appellate Division of the Supreme Court, State of New York, held in and for First Judicial Department at the Court House, in the County of New York on the 28th day of July, 1919.

Present—Hon. John Proctor Clarke,
Presiding Justice,
" Victor J. Dowling,
" Walter Lloyd Smith,
" Alfred R. Page,
" Eugene A. Philbin,
Justices.

James J. E. Burke,
Plaintiff-Appellant,
—against—
Union Pacific Railroad Company,
Defendant-Respondent.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, First Department, dated the 13th day of July, 1917, directing that judgment be entered herein in favor of the plaintiff and against the defendant for the sum of Fifty-six hundred dollars, and interest less defendant's costs, and from the judgment entered pursuant to said order in the office of the Clerk of the County of New York, on the 31st day of July, 1917, in favor of the plaintiff and against the defendant for the sum

148 *Order of Appellate Division.*

of six thousand three hundred forty-nine and 72/100 dollars; and this said appeal having been duly argued at the Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudged that the said judgment of the Appellate Djvision of the Supreme Court, appealed from herein as aforesaid be reversed and judgment granted in favor of the plaintiff and against the defendant for the sum of Seventeen thousand five hundred forty-nine and 1/100 dollars, with interest from March 10th, 1915, with
149 costs in this Court, and in the Appellate Division, and having further ordered and adjudged that the proceedings therein be remitted to the Appellate Division to the Supreme Court there to be proceeded upon according to law.

Now on reading and filing the remittitur from the Court of Appeals therein and upon motion of Tipple & Plitt, attorneys for the plaintiff herein it is.

Ordered that the said judgment of the Court
150 of Appeals be and the same hereby is made the judgment of this Court.

Clerk's Certificate. 151

APPELLATE DIVISION

OF THE

SUPREME COURT,

FIRST JUDICIAL DEPARTMENT,

Clerk's Office,

NEW YORK COUNTY.

JAMES J. E. BURKE,

Appellant. 152

—VS.—

UNION PACIFIC RAILROAD COMPANY,

Respondent.

I, ALFRED WAGSTAFF, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy order has been compared with the original thereof filed in this office on the 28th day of July, 1919, and that the same is a correct transcript thereof, and of the whole of the said original. 153

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 3rd day of October, 1919.

[SEAL]

ALFRED WAGSTAFF,
Clerk.

154 **Judgment.**

SUPREME COURT,

NEW YORK COUNTY.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

155 ---

A case agreed between the parties above named and duly executed and acknowledged having been submitted to the Supreme Court, Appellate Division, First Department, and the Appellate Division, First Department, having by order dated the 13th day of July, 1917, directed that judgment be entered in favor of the plaintiff and against the defendant in the sum of five thousand six hundred ($5,600) dollars with interest less defendant's costs and judgment having been entered thereon on the 31st day of July, 1917, in favor
156 of the plaintiff and against the defendant in the sum of six thousand three hundred forty-nine and 72/100 ($6,349.72) dollars and the plaintiff having appealed therefrom to the Court of Appeals and the said Court of Appeals having sent hither its remittitur filed in the office of the Appellate Division, First Department on the 28th day of July, 1919, by which it appears that the said Court of Appeals has reversed the said judgment of the Appellate Division, First Department, and granted judgment in favor of the

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plaintiff and against the defendant for seventeen thousand five hundred forty-nine and 1/100 ($17,549.01) dollars with interest from March 10th, 1915, and with costs in that Court and in the Appellate Division and has given judgment accordingly and has remitted the judgment of said Court of Appeals to the Appellate Division, First Department to be enforced according to law, and the Appellate Division, First Department, having by an order dated the 28th day of July, 1919, a duly certified copy of which has been filed with the Clerk of this Court on the 5th day of August, 1919, ordered that said judgment be made the judgment of this Court and the plaintiff's costs having been duly taxed at the sum of two hundred eighty-nine and 57/100 dollars, now on motion of Tipple & Plitt, attorneys for the plaintiff, it is

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ADJUDGED that the plaintiff James J. E. Burke have judgment against the defendant the Union Pacific Railroad Company for the sum of seventeen thousand five hundred forty-nine and 01/100 ($17,549.01) dollars, together with $4,661.96 interest and $289.57 dollars, costs making in all the sum of twenty-two thousand five hundred and 54/100 dollars, and that said plaintiff have execution accordingly.

159

Dated, New York, August 14th, 1919.

WM. F. SCHNEIDER,
Clerk.

160

Clerk's Certificate.

State of New York,
County of New York—ss.:

I. WILLIAM F. SCHNEIDER, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, That I have compared the preceding with the original judgment on file in my office, and that the same is a correct Transcript therefrom, and of the whole of such original.

Indorsed filed, August 14th, 1919, 11 h. 5 m.

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IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal, this 4th day of October, 1919.

WILLIAM F. SCHNEIDER,
Clerk.

[SEAL]

162

2124—1917.

530.

Supreme Court. New York County.

JAMES J. E. BURKE, Plaintiff-Appellee,

against

UNION PACIFIC RAILROAD COMPANY, Defendant-Appellant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the certified transcript of the record in this action filed with the Clerk of the Supreme Court of the United States with the petition for a writ of certiorari to the Supreme Court of the State of New York, may be taken as the return to the writ of certiorari granted herein by the Supreme Court of the United States on the seventeenth day of November, 1919.

Dated, New York, November 24, 1919.

TIPPLE & PLITT,
Attorneys for Plaintiff.
HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Defendant.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Being informed that there is now pending before you a suit in which James J. E. Burke is plaintiff, and Union Pacific Railroad Company is defendant, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of November, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

No. —.

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, that I have compared the proceding with the original certificate of Writ of Certiorari and Stipulation on file in my office, and that the same is a correct Transcript therefrom, and of the whole of such original.

Indorsed Filed Dec. 9-1919.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 24 day of Jan., 1920.

WM. F. SCHNEIDER,
Clerk.

F. J. G.

[Endorsed:] 2124-1917. Supreme Court of the United States, No. 568, October Term, 1919. Union Pacific Railroad Company vs. James J. E. Burke. Office of the Clerk. Supreme Court U. S. Received Jan. 26, 1920. Writ of Certiorari. Filed Dec. 9, 1919.

[Endorsed:] File No. 27,323. Supreme Court U. S. October Term, 1919. Term No. 568. Union Pacific R. R. Co., Petitioner, vs. James J. E. Burke. Writ of certiorari and return. Filed Jan. 26, 1920.

[redacted]

United States Supreme Court

1

OCTOBER TERM, 1919.

UNION PACIFIC RAILROAD COMPANY,
(Defendant-Appellee) Petitioner,

—against—

JAMES J. E. BURKE,
(Plaintiff-Appellant) Respondent.

PETITION.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

2

The petition of the Union Pacific Railroad Company respectfully shows to this Honorable Court as follows:

Facts of the Case.

Your petitioner is a common carrier, incorporated under the laws of the State of Utah, and

the respondent is a citizen and resident of the State of New York.

On or about March 10, 1915, at Yokohama, Japan, the firm of S. Outra and Brother, delivered to the Pacific Mail Steamship Company (hereinafter called the Steamship Company), for transportation, fifty-six (56) cases of drawn work goods and Renaissance, consigned to New York City, New York, to be there delivered to the shipper's order, and the Steamship Company delivered and the shipper accepted a bill of lading, one of the conditions of which provided that the carrier's liability for loss should be limited to One hundred ($100.00) dollars per package unless a different value was declared by the shipper. No different value was in fact declared by the shipper.

The freight was not prepaid, but the bill of lading showed as collect freight the sum of Five hundred and seven and 2/100 ($507.02) dollars, made up as follows:—Ocean fright at the rate of fifty cents (50c.) per hundred pounds, based on the weight of the shipment of 26,404 pounds, or a total of One hundred thirty-two and 2/100 ($132.02) dollars, ocean freight from Yokohama to San Francisco, and rail freight at the rate of One and 25/100 ($1.25) dollars per hundred pounds, based upon a mirimum carload weight of 30,000 pounds, or a total of Three hundred and seventy-five ($375.00) dollars, rail freight, from San Francisco to New York.

The Steamship Company duly transported the property to San Francisco, California, and there delivered it to the Southern Pacific Company, and the Southern Pacific Company thereupon transported the property to its point of junction with your petitioner's line and delivered it to your petitioner for carriage.

The entire shipment was totally destroyed at 7
or near Rawlins, Wyoming, while in the custody of your petitioner.

At the time the shipment was made, the so-called Carmack Amendment (34 Stat. L. 595) was in effect, but the Cummins Amendment (38 Stat. L. 1196) had not yet taken effect.

The invoice and market value of the goods amounted to $17,549.01.

Prior to the commencement of this action, the 8
respondent became the owner of all claims and rights of action arising out of the facts above set forth, through written assignments for value duly executed by S. Ontra and Brother to Douglas F. Cox, of West Orange, New Jersey, and by said Douglas F. Cox, to respondent.

The Proceedings in the Appellate Division of the Supreme Court of New York. 9

On January 18, 1917, the case was submitted on an agreed statement of facts to the Appellate Division of the Supreme Court of the State of New York for the First Department. The Ap-

pellate Division held that the clause in the ocean bill of lading limiting the carrier's liability to $100.00 per package was valid, even though the
10 rate of freight charged was not based on such valuation; that since the ocean bill of lading was denominated a through bill of lading, and stated the liabilites of companies and carriers, the agreement was intended to apply to all successive carriers, but that the shipment during its transit over your petitioner's line was controlled by the Interstate Commerce Law, the filed classifications and tariffs and the provision of the uniform bill of lading. The Appellate Division further held that while the schedule of classifications filed
11 with the Interstate Commerce Commission did not specifically provide for such an agreement for limited liability, it did not forbid it; that the uniform bill of lading provided that loss or damage shall be computed:

1. On the basis of the invoice value of the property.
2. Unless a lower value was represented in writing by the shipper or
3. Agreed upon, or
4. Determined by the classification or
12 by the tariffs upon which the rate is based.

The court further held that the shipment in this case fell within the third class, in that a lower value had been agreed upon by the carrier and the shipper, and that therefore the valuation clause was valid.

In accordance with this opinion, the Appellate Division entered an order that the respondent have judgment against your petitioner for the sum of $5600.00, with interest from March 10, 1915, less your petitioner's taxable costs and disbursements and judgment was entered in the Supreme Court for New York County awarding to the respondent against your petitioners, the sum of $6,349.72. 13

The Proceedings in the Court of Appeals. 14

An appeal from the decision of the Appellate Division was duly allowed and taken by the respondent to the Court of Appeals of the State of New York. The Court of Appeals by a divided court reversed the judgment, Judge Collin writing the majority opinion and Judge Hogan dissenting.

In its opinion the majority of the Court of Appeals held that the agreed valuation clause was a term of the bill of lading, which was not specifically contained in the filed tariffs; that while the permissibility of limiting the recovery to a valuation agreed upon has been conclusively established, the permissibility must be shown or declared by the established and filed classifications; that the charge made for inland transportation was not based on the valuation; that the shipper had been given no choice of rates, and that there was no relation between the agreed 15

16 valuation and the freight rate fixed; that there was therefore no basis for an estoppel as against the respondent, and that therefore the respondent was entitled to recover the invoice value of the goods.

Judgment was entered accordingly against your petitioner for the sum of $17,549.01, with interest from March 10, 1915, together with costs in said Court of Appeals and said Appellate Division. A remittitur was duly filed in the office of the Clerk of the Appellate Division of the Su-
17 preme Court for the First Department, and on the 28th day of July, 1919, the said judgment of the Court of Appeals was made the judgment of the said Appellate Division of the Supreme Court. The said order of the Appellate Division was duly filed in the office of the Clerk of the Supreme Court for New York County on the 5th day of August, 1919, and in accordance with said order judgment was entered in the Supreme Court of New York County, in favor of the plaintiff on the 14th day of August, 1919, for the sum of Twenty-two thousand five hundred and 54/100
18 ($22,500.54) dollars.

The questions argued before the Appellate Division and the Court of Appeals and decided by them, are as follows:

1: Under the Carmack Amendment (prior to the Cummins Amendment) is an agreed valuation in a through bill of lading rendered invalid

simply because the rate of freight for the rail portion of the transit is the same under the filed 19
tariffs regardless of the value of the goods.

2: Does the Carmack Amendment render invalid a valuation not based on a difference of rate?

3: Is the rule in *Reid* v. *Fargo* (241 U. S. 544) that a valuation in an ocean bill of lading is valid even though no higher rate would have been charged if the goods had been shipped at their actual valuation, applicable where the loss occurs on the inland portion of the shipment, or has the Carmack Amendment created a different 20
rule with respect to Interstate Commerce?

And your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the following reasons, among others:

1. Because an important question of interstate commerce is involved.

2. Because the questions of law herein have 21
not been passed upon by this Court.

3. Because there is a division of opinion between the Appellate Division of the Supreme Court of New York and the Court of Appeals of

New York on the question of the validity of an agreement fixing the value of a shipment originating outside of the United States and carried in interstate commerce in the United States.

4. Because the Court of Appeals of New York bases its decision on the ground that such an agreement to limit liability is not valid unless the rate of freight charged is based on the agreed value, thus establishing a rule as to interstate shipments at variance with the Federal rule as to foreign shipments as laid down in *Reid* v. *Fargo* (241 U. S. 544).

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of said Supreme Court in this case which was entitled in that Court: "James J. E. Burke, plaintiff, against the Union Pacific Railroad Company, defendant," to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your Petitioner may have such other and further relief in the premises, as to this Court may seem just, and that the said judgment of the

said Supreme Court may be modified by this Honorable Court.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
By OSCAR R. HOUSTON.

State of New York,
County of New York—ss.: 25

OSCAR R. HOUSTON, being duly sworn deposes and says:

That he is a member of the firm of Harrington, Bigham & Englar, attorneys for the Union Pacific Railroad Company, petitioner herein; that he participated in the preparation of the foregoing petition, and knows the contents thereof, and that the allegations therein are true as he verily believes. 26

OSCAR R. HOUSTON.

Sworn to before me this
9th day of October, 1919.

CORNING G. MCKENNEE,
Notary Public, [NOTARIAL SEAL]
Queens County No. 1183.

Certificate filed in New York County, Clerk's No. 150; New York Co. Register's No. 1110.
Certificate filed in Kings County, Clerk's No. 17; Kings County Register's No. 146.
Term expires March 30, 1920.

We hereby certify that we have examined the foregoing petition and in our opinion it is well
27 founded and is entitled to the favorable consideration of this Honorable Court.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1919.

UNION PACIFIC RAILROAD COMPANY,
(Defendant-Appellee) Petitioner,

—against—

JAMES J. E. BURKE,
(Plaintiff-Appellant) Respondent.

BRIEF FOR PETITIONERS.

This is a petition for a writ of certiorari to the Supreme Court of the State of New York, to bring up for review a case arising out of the loss of some goods on the petitioner's line of railroad while en route from Yokohama to New York. The petitioner's liability is admitted, and the only question is as to the amount of damages. The facts are fully set out in the agreed statement [Record, (fols. 4-15)] and in the petition.

I.

The precise question at issue is whether, in order that an agreed valuation of an interstate shipment shall be valid, before the passage of the so-called Cummins Amendment, the rate of freight charges must have been based upon the agreed valuation.

The Appellate Division of the Supreme Court and the Court of Appeals agree:

(1) That the ocean bill of lading under which the goods were shipped was a through bill of lading;

(2) That the agreed valuation was intended to apply and did apply to all successive carriers;

(3) That the shipment during its carriage over the petitioner's line was subject to the Interstate Commerce Law, the filed classifications and tariffs and the provisions of the uniform bill of lading; and

(4) That nothing in the Interstate Commerce Act prior to the passage of the Cummins Act made such an agreement illegal.

The Appellate Division held that it was of no

moment that the inland freight charges did not appear to have been based on this valuation of $100 per package; and cited *Reid* v. *Fargo,* 213 Fed. 771; affirmed on this point 241 U. S. 544.

It is to be noted that there is no proof whether or not the *ocean* freight would have been different had a different value been placed on the goods.

The case of *Reid* v. *Fargo* involved an automobile shipped from England to the United States under a bill of lading which contained a clause fixing its value at $100. The shippers proved affirmatively that the carrier's rates on automobiles were based on measurement (that is, so much per 40 cubic feet), and that, if the full value of the automobile had been declared, the rate would have been the same. Although the bill of lading recited that where a higher value was declared "extra freight as may be agreed upon" was to be paid, it was proven affirmatively that no such extra freight rate actually existed and that no extra freight would have been asked by the Carrier.

In sustaining the valuation the Circuit Court of Appeals for the Second Circuit said:

> "Similar stipulations are held binding in this court. *George N. Pierce Co.* v. *Wells Fargo Co.,* 189 Fed. 561, 110 C. C. A. 645. But the proctors for the express company contend that, as the freight on the car was calculated on measurement and not on

> value, this stipulation does not apply. Freight rates on a package and the amount an owner may recover in case of loss are two entirely different things. The parties may agree that for a higher freight the package shall be valued for purposes of recovery at over $100. In this case they have agreed that the value of the car is $100 and that must be taken to be its true value for the purposes of the contract of carriage. Of course the stipulation would not apply if the car had been charged an *ad valorem* freight on a value over that amount. But in this case the freight was charged on measurement."

On certiorari the Supreme Court sustained the limitation without discussion (241 U. S. 544) although reversing the decree as to other parties.

In the present case, the Court of Appeals of New York, overruling the Appellate Division, held that the agreed valuation was not valid and effective because the charge made for the inland transportation was not based upon the agreed valuation. In support of this conclusion they cite numerous Federal and New York decisions, none of which, however, decide the point.

The cases cited by the New York Court of Appeals are the following:

The case of *Hart* v. *Penn R. Co.*, 112 U. S. 331 involved a shipment of live stock under a bill of lading containing an agreed valuation clause. There was no evidence one way or the other as to whether the rate of freight was based

on the valuation. The court assumed that the rate was so based, and held the agreed valuation clause valid. The case is not authority, however, for the decision that without a rate of freight based on the valuation the agreed valuation is invalid. At most, *Hart* v. *Penn R. Co.* rises no higher than dictum on this point.

American Express Co. v. *U. S. Horse Shoe Co.*, 244 U. S. 58, was a suit against the plaintiff in error for failure to deliver a colt delivered to it for transportation. The express receipt fixed a primary value of $50 each for colts. No other value was written in by the shipper and the rate charged was based on the $50 value. The court held the limitation of liability was valid, basing their decision on an estoppel against the shipper.

The case of *Pierce Co.* v. *Wells Fargo & Co.*, 236 U. S. 278 involved a shipment of automobiles by express from Buffalo to San Francisco, the express receipt stating that the value of the goods was limited to $50 unless a greater value was declared, which had not been done. It is true that two freight rates were offered the shipper in this case but the fact that the court held the stipulation valid is again not a decision that it would have been *invalid* if there had been but one rate.

The case of *Kansas City Southern Railroad Co.* v. *Carl*, 227 U. S. 639, involved a shipment of

household goods, in which the shipper signed an owner's released valuation clause limiting liability for loss or damage to $5 per hundred weight, in consideration of which he received a lower freight rate; and the clause was held valid.

In *Adams Express Co.* v. *Croninger*, 226 U. S. 491, a case involving the shipment of a diamond ring by express, the receipt contained a stipulation limiting the valuation to $50 unless a greater value declared. The Court held the stipulation valid and used the following language.

> "It has therefore become an established rule of the common law as declared by this Court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk."

This rule is not, however, authority for the *converse* rule that if the agreed value is made for some other purpose it is *invalid*.

Chicago, Rock Island & Pacific Ry. Co. v. *Cramer*, 232 U. S. 490, is to the same effect. This case involved a shipment of a carload of hogs, whose value the shipper represented to be $10 per head, in order to secure a lower rate of freight. The court held the valuation binding.

Western Transit Co. v. *A. C. Leslie & Co., Ltd.*, 242 U. S. 38, held that the released valuation clause in an interstate bill of lading when based upon a difference in freight rates was valid.

Boyle v. *Bush Terminal R. R. Co.*, 210 N. Y. 389, concerned a contract between shipper and carrier, where the valuation was limited to $5, per 100 pounds in consideration of a lower rate of freight and again the stipulation was held valid.

D'Utassy v. *Barrett*, 219 N. Y. 420, held that an agreed valuation by shipper and carrier concluded the shipper even where the loss was due to theft by the carrier's own servants.

Moore v. *Duncan*, 237 Fed. 780, was a case involving a shipment of pig iron, in which the shipper paid a freight rate based on a released valuation of $100 and the released valuation clause was held valid, the court again basing its decision on the basis of estoppel against the shipper.

The case of *Boston & Maine R. R. Co.* v. *Piper*, 246 U. S. 439, was a case which decided that a stipulation in a contract for the shipment of live stock, limiting the carrier's liability, in case of unusual delay and detention, to the amount actually spent by the shipper in the purchase of food and water for his stock, was invalid, be-

cause a stipulation exonerating the carrier from losses due to his own negligence.

Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Rankin, 241 U. S. 319, involved a shipment of mules, in which the bill of lading stipulated that the value should not exceed $75 per animal and that for every increase in value of 100% or fraction thereof, the tariff should be increased 50%. The court held the stipulation valid, and at page 327 delivered itself of the following dictum, for which it cited no authority:

> "The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability."

The statement is only dictum, however, and in no case where a choice of rates has not been made to appear, has it been decided that the agreed valuation clause was invalid.

II.

The question at issue has not been decided by this court in any case involving interstate commerce.

The cases cited by the Court of Appeals, a summary of which is given above, do not sustain

the proposition in support of which they are cited. They are all cases in which the agreed valuation clause was held valid; but dicta from them are used to support a holding that an agreed valuation clause is invalid, unless a choice of rates has been offered the shipper.

Your petitioners contend that the conclusion of the Court of Appeals is based upon a logical fallacy which may be expressed syllogistically as follows:

Major Premise: In all cases where the freight rate is based on the valuation, the agreed valuation clause is held valid.

Minor Premise: In this case, the freight rate is not based on the valuation.

Conclusion: In this case, the agreed valuation clause is not valid.

The fallacy is obvious. To express the fallacy in terms of logic, the Major Term is distributed in the conclusion and undistributed in the premise, and so violates the rule that a term distributed in the conclusion must also be distributed in its premise.

III.

The rule at federal common law has been settled in favor of your petitioners.

The case of *Reid* v. *Fargo*, 241 U. S. 544, is an express adjudication that, by the law as administered in the Federal Courts, apart from statute, an agreed valuation is valid and binding, regardless of whether or not the freight rate is based on the valuation agreed upon. If therefore the present case is to be decided on the principles of the Common Law, as administered in the Federal Courts, *Reid* v. *Fargo* is decisive of the question, and the Court of Appeals of New York erred in holding the case inapplicable. (*Reid* v. *Fargo* was an admiralty case, but on this point no distinction between admiralty and common law has ever been suggested.)

IV.

Interstate commerce is governed by the federal common law and the Interstate Commerce Act.

The effect of the Carmack Amendment to the Interstate Commerce Act was to withdraw interstate commerce from the diverse operation of state laws, and subject it to a uniform Federal rule.

In the case of *New York Central R. R.* v. *Beaham*, 242 U. S. 148, the Court said at page 151:

> "The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and *common law principles* accepted and enforced in federal courts."

And in *Southern Express Company* v. *Byers*, 240 U. S. 612, at page 614, the Court said:

> "Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and *common law principles* accepted and enforced by the federal courts."

V.

If the Carmack Amendment has laid down a different rule for interstate commerce, the question should be decided by this court.

If the common law rule as enunciated in *Reid* v. *Fargo* does not apply to this shipment, then the Carmack amendment must have changed the rule for interstate commerce. If so, your petitioners contend that the question is a proper and an important one for review by this Court.

Neither the New York Court of Appeals nor the Appellate Division have suggested that the Carmack Amendment has changed the rule, and we do not mean to intimate that it affects the decision of this case.

VI.

The Supreme Court of New York is the proper court to which the writ should be addressed.

The reviewing courts in New York State do not retain the judgment after record, but remit it to the Court below. On this account a writ from this Court is properly addressed to the Supreme Court of New York, in whose custody the record of the case now is.

Gelston v. *Hoyt,* 3 Wheaton, 246 at 249 and 335;
Atherton v. *Fowler,* 91 U. S. 143 at 146 and 148;
McGuire v. *Commonwealth,* 3 Wall, 382 at 386.

Respectfully submitted,

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Petitioner.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
Of Counsel.

Sirs:

Take notice that we shall submit the foregoing petition for a writ of certiorari and brief in support thereof to the Supreme Court of the United States at the opening of the Court on Monday, November 10th, 1919.

Dated, New York City, October 23, 1919.

Yours, etc.,

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Petitioner.

To TIPPLE & PLITT, Esqs.,
Attorneys for Respondent.

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FILED
JAN 6 1921
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 183.

UNION PACIFIC RAILROAD COMPANY,
Defendant-Appellee, Petitioner,

—against—

JAMES J. E. BURKE,
Plaintiff-Appellant, Respondent.

BRIEF FOR PETITIONER.

This is a writ of certiorari to review a submitted controversy decided by the State Courts of the State of New York.

The facts agreed upon in the submission are as follows: (Record, pp. 2-6.)

I. On March 10th, 1915, at Yokohama, Japan, the firm of S. Ontra & Brother (the Respondent's assignor), delivered to the Pacific Mail Steamship Company for transportation, certain property consisting of 56 cases of drawn work goods and Renaissance consigned to New York, New York, to be there delivered to the shippers' order, notify S. Ontra & Brother, 425 Broadway, New

York, and at the time and place of shipment the Pacific Mail Steamship Company delivered to S. Ontra & Brother, a bill of lading, which was duly accepted by the shipper and appears as Exhibit "A" (pp. 7-8).

II. The Pacific Mail Steamship Company duly transported the shipment to the Port of San Francisco, where it delivered it to the Southern Pacific Company, and the Southern Pacific Company thereupon transported the property to its point of junction with petitioner's line, at which place it delivered it to the petitioner, as the next carrier on the way to New York.

III. The whole shipment was totally destroyed by fire near Rawlins, Wyoming, while in the custody of the petitioner, as carrier, and the liability of the petitioner for the loss is not disputed; this controversy relates to the *amount* of the liability.

IV. The freight was to be collected at destination and the bill of lading (Exhibit A, p. 7) shows as collect freight the sum of $507.02, made up as follows: *Ocean freight* at the rate of 50 cents per hundred pounds based on the weight of the shipment of 26,404 pounds, or a total of $132.02, and *rail freight* at the rate of $1.25 per hundred pounds, based upon a minimum carload weight of 30,000 pounds, or a total of $375.00. The bill of lading also contained an agreement that the valuation of the shipment was $100.00 per package. This is the provision upon which the Petitioner bases its case (p. 8, clause 13).

V. The petitioner, the Southern Pacific Company and the other carriers involved had duly filed, in accordance with the Interstate Commerce Act, certain classifications, tariffs and schedules of rates (the mate-

rial part which appears as Exhibit B, pp. 9-20). The material provisions of the filed Tariffs were in substance as follows:

1. If the shipment was carried under the terms of the Uniform Bill of Lading (p. 17), the rates per 100 pounds were as follows (p. 21):

> Item 250, Linen Goods, not otherwise specified, and Sinaway, in packages, less than carloads, $1.60; carloads, $1.25.
>
> Item 255, Linen Goods, in packages of valuation of $900, or more, per 40 cubic feet, less than carloads, $4.00; carloads, (left blank).

The shipment was worth less than $900 per 40 cubic feet, and freight was computed under Item 250.

If the shipment was carried *not* under the terms of the Uniform Bill of Lading, the rate would be 10 per cent. higher (p. 13, Rule 9-D).

VI. The respondent claims upon the foregoing facts that he is entitled to recover judgment for $17,549.01, the invoice and actual value of the shipment, and the petitioner claims that the respondent is entitled to recover only $5,600, the value calculated on the basis of $100 per package.

VII. The Appellate Division of the Supreme Court of New York agreed with the Petitioner's view, and gave judgment for the respondent for the sum of $5,600. Its opinion is at p. 24 of the Record.

VIII. The Court of Appeals of New York reversed this decision, and gave judgment for $17,549.01. Its opinion is at p. 37 of the Record.

POINT I.

The value of the shipment was agreed upon between the shipper and the carrier. Such valuation is binding upon the parties unless it is made invalid by the Interstate Commerce Act.

The bill of lading contained the following provision in paragraph 13: (See Record, pp. 7 and 8.)

> "It is expressly agreed that the goods named in this bill of lading are hereby valued at not exceeding $100.00 per package, and unless a different or other value is expressly written and declared herein, the liability of the Companies therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed $100.00 per package, and in case of the partial loss of or damage to any of said goods, the liability of the carriers shall not exceed such proportion thereof per package as the loss or damage on each package shall bear to the sum of $100.00."

This provision, by the common law as administered in the Federal Courts and in the Courts of New York, constitutes a valid agreement and fixes the amount of recovery at not exceeding $100.00 per package.

> *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331.
> *Greenwald* v. *Barrett*, 199 N. Y. 170.

The bill of lading was a through bill of lading, and was intended to apply to all connecting carriers. The bill recited:

"from Yokohama via San Francisco to New York,"

and further recited:

"Received in apparent good order and condition, * * * from S. Ontra & Brother, to be transported by the Pacific Mail Steamship Company on board the steamship Persia, * * * from Yokohama unto the port of San Francisco, * * * and there upon the arrival of said steamer in like condition to be received by and delivered unto the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, or the Western Pacific Railway Company, or any one of them, and thence to be transported by said Company and connecting railroad companies to New York, and there in like condition to be delivered unto * * * order."

The particular provision fixing the value of the goods —Section 13, above quoted—refers to the liability of "the Companies," and later "the Carriers."

This clearly makes out a case in which the petitioner is one of a line of connecting carriers, all of which are entitled to the benefit of the released valuation, and other provisions of the original bill of lading, even though they were not specifically named therein.

R. R. Co. v. *Androscoggin Mills*, 22 Wall. 594.

Whitworth v. *Erie Ruy. Co.*, 87 N. Y. 413.

White v. *Weir*, 33 A. D. 145.

Woodruff v. *Havemeyer*, 106 N. Y. 129, at p. 134.

POINT II.

At the time the shipment was made, agreed valuations had not been made illegal by the Interstate Commerce Act.

In *Greenwald* v. *Barrett*, 199 N. Y. 170, the Court of Appeals said, at page 173:

> "The question to be determined upon this appeal is whether this Federal legislation forbids an express company from making a contract with a shipper such as we have quoted from the receipt given to the plaintiffs. If that question is answered in the affirmative, the plaintiffs were entitled to recover whatever they could prove to have been the actual value of the property shipped. If it is answered in the negative, their recovery must be limited to the agreed value of the property under the terms of the receipt. * * * The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods *or to agree with the shipper upon a valuation of the property carried.*"

This interpretation of the Act has been expressly approved by this Court, in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, at page 512, where this Court quoted the above passage, among others, with approval.

It is to be noted that the present shipment was made on March 10, 1915, some months before the coming into effect of the so-called Cummins Amendment, which specifically forbade the making of agreed valuations, except under certain restrictions. This Act was approved March 4, 1915, but came into effect June 2, 1915 (38 U. S. Statutes at Large, Part I, p. 1196, Chap. 176), some months after this shipment.

POINT III.

The validity of the valuation clause depends upon the Federal Common Law and the Interstate Commerce Act.

The effect of the Carmack Amendment to the Interstate Commerce Act was to withdraw interstate commerce from the diverse operation of State laws, and subject it to a uniform Federal rule.

In the case of *New York Central R. R.* v. *Beaham*, 242 U. S. 148, this Court said at page 151:

> "The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and *common law principles* accepted and enforced in federal courts."

And in *Southern Express Company* v. *Byers*, 240 U. S. 612, at page 614, the Court said:

> "Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and *common law principles* accepted and enforced by the federal courts."

POINT IV.

The filed tariffs provided for a valuation agreed upon between the shipper and the carrier.

It is contended by the respondent that, as soon as the goods were loaded on cars at San Francisco, and

began their rail transit from San Francisco to New York, they became shipments in interstate commerce, and automatically became subject to the provisions of the filed tariffs and the Uniform Bill of Lading governing import shipments from San Francisco to New York, and that the rights and liabilities of the parties are, therefore, fixed by such tariffs, and this view has been upheld by the Appellate Division and the Court of Appeals. Assuming such to be the law, there is nothing in the tariffs that invalidates the agreed valuation.

The Western Classification, No. 53, specifically provides for the valuation of goods by agreement between the shipper and the carrier. The relevant provisions are as follows (p. 13):

> "Rule 9-A.—Unless otherwise provided, when property is transported subject to the provisions of the Western Classification, the acceptance and use are required, respectively, of the 'Uniform Bill of Lading,' 'Straight' or 'Order,' as shown on pages 87 to 90 inclusive."

The Uniform Bill of Lading provides in Section 3 as follows:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, *unless a lower value* has been represented in writing by the shipper, or *has been agreed upon*, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." (Italics are ours.)

It is to be noted that this provision recognizes four alternative measures of value upon which damages may be based:

1. The invoice value (including prepaid freight).

2. A lower value represented by the shipper.

3. A lower value agreed upon.

4. A lower value determined by the classification or tariffs upon which the rate is based.

and provides that the first value (invoice) shall govern unless one of the other three exists, in which event such lower value shall be the maximum amount to govern the computation of damages.

In the present case values 2 or 4 did not exist; that is, there was no value lower than invoice represented in writing by the shipper or determined by the classification of interstate tariffs upon which the rate was based. There was, however, a value under clause 3; that is, a lower value had been agreed upon. If the respondent is right in his contention that the shipment must be regarded as being governed by the uniform bill of lading with the same force and effect as if such a bill of lading had been issued to cover the shipment, nevertheless, this forms no basis for repudiating the agreed valuation made at the only point in the entire transit at which the shipper and the carriers could possibly make any agreements as to the value. If the Court is to destroy the contract as actually made between the parties and substitute the statutory contract, it must, at least, carry into the statutory contract such provisions of the real contract as are consistent with the statutory contract. As is pointed out above, the contract of shipment is the "bill of lading plus the schedules and tariffs." Neither the tariff nor the uniform bill of lad-

ing states how the agreed valuation should be stated, but the natural method of expressing such an agreement is in the bill of lading, and this Court can probably take judicial notice of the fact that agreed valuations are usually stated in the bill of lading, either in the printed clauses or by an endorsement by rubber stamp or in handwriting.

To express the petitioner's position more briefly: *The uniform bill of lading provides that damages shall be based on the invoice value, unless a lower value has been agreed upon, and in this case a value of* $100 *per package was agreed upon and stated in writing in its natural place, namely, the only bill of lading ever issued on the shipment.* Such valuation is therefore valid even if all the terms of the uniform bill of lading are read into the contract of carriage.

The Appellate Division decided the present case in Petitioner's favor on the above grounds (p. 28).

POINT V.

The fact that the tariffs did not have a special rate for shipments valued at $100 per package is immaterial.

The Court of Appeals of New York, in its opinion in the present case, reversed the Appellate Division, and held that the agreed valuation was not valid and effective on the sole ground that the charge made for the inland transportation was not based specifically upon the agreed valuation of $100 per package (p. 45).

It is submitted that this decision is contrary to the decision of this Court in

Reid v. *American Express*, 241 U. S. 544.

That case, it is submitted, is an express adjudication that, by the law as administered in the Federal Courts, an agreed valuation is valid and binding, regardless of whether or not the freight rate is based on the valuation agreed upon.

The case of *Reid* v. *Fargo* involved an automobile, shipped from England to the United States, under a bill of láding which contained a clause fixing its value at $100. The shippers proved affirmatively that the carrier's rates on automobiles were based on measurement (that is, so much per 40 cubic feet), and that, if the actual value of the automobile had been declared, the rate would have been the same. Although the bill of lading recited that, where a higher value was declared, "extra freight as may be agreed upon," was to be paid, it was proved affirmatively that no such extra freight rate actually existed and that no extra freight would have been demanded by the Carrier.

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If, therefore, the present case is to be decided on the principles of the Common Law, as admi inistered in the Federal Courts, *Reid* v. *Fargo,* is decisi ive of the question, and the Court of Appeals of New York erred in holding the case inapplicable. The fact t that *Reid* v. *Fargo* was an admiralty case affords no ground for distinction between the two cases.

Reid v. *American Express Co.* has b been cited, and followed in *Kuhnhold* v. *Compagnie Gene eral Transatlantique,* 251 Fed. 389, where Judge Mayer, in the District Court for the Southern District of New York, in construing a bill of lading provision in a Fr rench Line bill of lading, similar to the present one, said l:

> "The language is simple and clear. It is entirely within the power of the shipper to declare value, and, in such event, in n case of loss, the intrinsic value at the loading p port is allowed. If the shipper, however, fails to declare value, and thus leaves the carrier entirely y in the dark, in that regard, the shipper is fully y informed by the bill of lading what the maxim mum allowance for loss will be, with the reservati ion to the carrier at its option to make good eith her at so much per measurement or so much per w weight; the assumption being, of course, that th he carrier will choose the lesser figure."
>
> Since *Hart* v. *Pennsylvania R R. R. Co.,* 112 U. S. 331, limited liability clauses h have been held good, if these clauses amount to an agreement and are reasonable."

The opinion of the Court of Appeals is based entirely upon *dicta* in this Court, which so far as they are in point at all, are overruled by *Reid* v. *American Express.*

The cases cited by the New York Court of Appeals are the following:

The case of *Hart* v. *Pennsylvania R. R. Co.,* 112 U. S. 331, involved a shipment of live stock under a bill of lading containing an agreed valuation clause. There was no evidence one way or the other as to whether the rate of freight was based on the valuation. The Court assumed that the rate was so based, and held the agreed valuation clause valid. The case is not authority, however, for the contention that without a rate of freight based on the valuation the agreed valuation is invalid. At most, *Hart* v. *Pennsylvania R. R. Co.* rises no higher than dictum on this point.

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> "It has therefore become an established rule of the common law as declared by this Court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk."

This rule is not, however, authority for the *converse* rule, that if the agreed value is made for some other purpose it is *invalid*.

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Western Transit Co. v. *A. C. Leslie & Co., Ltd.*, 242 U. S. 448, held that the released valuation clause in an interstate bill of lading when based upon a difference in freight rates was valid.

Boyle v. *Bush Terminal R. R. Co.*, 210 N. Y. 389, concerned a contract between shipper and carrier, where the valuation was limited to $5 per 100 pounds, in consideration of a lower rate of freight, and again the stipulation was held valid.

D'Utassy v. *Barrett*, 219 N. Y. 420, held that an agreed valuation by shipper and carrier concluded the shipper even where the loss was due to theft by the carrier's own servants.

Moore v. *Duncan*, 237 Fed. 780, was a case involving a shipment of pig iron, in which the shipper paid a freight rate based on a released valuation of $100, and the released valuation clause was held valid, the Court again basing its decision on the basis of estoppel against the shipper.

The case of *Boston & Maine R. R. Co.* v. *Piper*, 246 U. S. 439, was a case which decided that a stipulation in a contract for the shipment of live stock, limiting the carrier's liability, in case of unusual delay and detention, to the amount actually spent by the shipper in the purchase of food and water for his stock, was invalid, because it was a stipulation exonerating the carrier from losses due to his own negligence.

Cincinnati, New Orleans & Texas Pac. Ry. Co. v. *Rankin*, 241 U. S. 319, involved a shipment of mules, in which the bill of lading stipulated that the value should not exceed $75 per animal, and that for every

increase in value of 100 per cent. or fraction thereof, the tariff should be increased 50 per cent. The Court held the stipulation valid, and at page 327 said *obiter*:

> "The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability."

The statement is only dictum, however, and *in no case where a choice of rates has not been made to appear, has it been decided that the agreed valuation clause was invalid.*

The cases cited by the Court of Appeals, a summary of which is given above, do not sustain the proposition in support of which they are cited. They are all cases in which there was a choice of rates and the agreed valuation clause was held valid; but dicta from them are used to support a holding that an agreed valuation clause is invalid, *unless* a choice of rates has been offered the shipper, an obvious *non sequitur*.

POINT VI.

The judgment entered on the remittitur of the Court of Appeals should be reversed and the judgment of the Appellate Division reinstated.

October Term, 1920.

Respectfully submitted,

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Petitioner.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. ~~508~~ 183

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

against

JAMES J. E. BURKE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARTHUR W. CLEMENT,
WILSON E. TIPPLE,
Attorneys for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1919.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
against
JAMES J. E. BURKE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

This action was brought to recover the value of a certain shipment lost while in the hands of the defendant as a carrier. The liability of the defendant is conceded, the only question in dispute being the amount of that liability.

THE FACTS.

On March 10, 1915, at Yokohama, Japan, the firm of S. Ontra & Brother, delivered to the Pacific Mail Steamship Company, a shipment consisting of 56 cases of drawn work and renaissance of the invoice value of $17,549.01, consigned to

New York to be carried from Yokohama to San Francisco by the Pacific Mail Steamship Company and by rail from San Francisco to New York by the Southern Pacific Company and its connecting carriers including the defendant.

The Steamship Company issued at Yokohama a bill of lading which in terms purported to fix the value of the shipment at $100 per package.

The Pacific Mail Steamship Company transported the property to San Francisco, and at that place delivered the property to the Southern Pacific Company, the initial rail carrier.

The Southern Pacific Company in turn transported the property to the end of its line and there delivered the property to the defendant, the Union Pacific Railroad Company, the next connecting carrier.

The property was totally destroyed at Rawlins, Wyoming, while still in the possession of the defendant as a carrier.

THE TARIFFS.

The shipment so far as its transportation from San Francisco to New York is concerned, was interstate commerce and concededly moved under a rate of $1.25 per hundred pounds based upon a minimum carload weight of 30,000 pounds.

This rate was duly filed and established by the defendant (Item 250 of Transcontinental Freight Bureau East Bound Import Tariff No. 26A Exhibit B, Record, page 20), and was governed by Western Classification No. 53.

Rule 9 of Western Classification No. 53 is printed at length at Record, page 13. In brief, it provides that at the established rate, the shipment

shall be carried subject to the terms of the uniform bill of lading.

The uniform bill of lading upon the use of which the rate given was conditioned appears in the Record at pages 14 and 15. It contains no limitation on the amount of plaintiff's recovery, except the second paragraph of the third section which merely limits the shipper's recovery in the invoice price of the shipment and reads as follows:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The material parts of all the tariffs filed by the defendant are stipulated (fol. 12) and in none of defendant's tariffs is there any provision limiting the amount of defendant's liability or any provision for alternative rates based upon a valuation placed upon a shipment.

From the above it is clear:

1. That this shipment moved at the time of its loss under a rate, tariff and classification duly filed by the defendant as required by the Interstate Commerce Act.

2. That the rate under which this shipment moved from San Francisco to New York was conditioned upon the use of the uniform bill of lading and of no other bill of lading.

3. Only one rate was filed and offered by the defendant i. e., $1.25 per hundred pounds. Whether the shipper at San Francisco had said "my shipment is valued at $500 per package" or "my shipment is valued at $10 per package," defendant's charge could only have been $1.25 per hundred. *It was the only legal rate.*

THE CONTROVERSY.

The only question was as to the amount of the defendant's liability.

The defendant contended that its liability is limited to $100 per case, the amount specified in the bill of lading issued at Yokohama, Japan, by the Pacific Mail Steamship Company (Exhibit A, Record, pages 7 and 8) claiming that this $100 limitation was incorporated by reference into the uniform bill of lading, as an "agreed valuation."

The plaintiff contended:

1. That the $100 clause of the Japanese bill of lading is void in so far as this loss in interstate commerce was concerned, because it was not filed as a part of defendant's interstate tariff.

2. That even if the $100 clause of the Japanese bill of lading be held to be incorporated by reference into the uniform bill of lading, nevertheless it is void and illegal because it is not an agreed valuation based on a difference in freight charges and it is therefore void under the decisions of the Federal courts which control this case.

The action was submitted to the Appellate Division of the New York Supreme Court upon an agreed statement of facts. The Appellate Division, misapprehending the holding of this Court in Reid vs. Fargo, 241 U. S., 544 (fol. 77) held that the shipper's recovery was limited to $100 but allowed an appeal to be taken to the New York Court of Appeals.

The New York Court of Appeals correctly interpreting Reid vs. Fargo (fol. 141), reversed the decision of the Appellate Division, and awarded the plaintiff judgment for the full amount of his claim on the distinct ground that the $100 limitation would in any case be void as it was not based upon a difference in freight rates.

The defendant carrier now seeks to review this decision by a writ of certiorari basing its application on the following principal grounds:

1. The petitioner claims that the questions of law herein have not been passed upon by this Court, and

2. That the Court of Appeals has by its decision failed to follow the decision of this Court in Reid vs. Fargo, 241 U. S., 544.

I.

The decision of the New York Court of Appeals was in accord with a principle long established by the decisions of this court.

The Court of Appeals correctly held that this shipment was at the time of its loss, interstate

commerce, moving under a filed rate and tariff and subject to the terms of the uniform bill of lading, and recognized the binding force of the decisions of this Court.

The Court of Appeals in its opinion cited many decisions of this Court and drew the correct conclusion that under the authorities an "agreed or released valuation is valid and effective as the extent of a loss, only when it is related to the rate charged for transportation" (fol. 132).

Applying this principle to the present case, the Court of Appeals held invalid the petitioner's claim that plaintiff's recovery was limited to $100 per package upon the ground that such a limitation would be void because the one rate offered by the carrier had no relation to the "agreed valuation" and there were no alternative rates and values offered to the shipper (fols. 139-140).

The proposition of law enforced by the Court of Appeals in this case has been repeatedly passed upon by this Court.

It is a fixed requirement of all the decisions of this Court sustaining agreed valuations that an "agreed valuation" to be valid must be supported by a freight rate based upon it, or in other words the shipper must have obtained a lower freight rate in consideration of agreeing to the limited valuation of his shipment.

Thus in the leading case of Hart vs. Penn. R. R. Co., 112 U. S., 331 the Court said:

> "The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made agreeing on the valuation of the property carried, *with the rate of freight based on the*

> *condition that the carrier assumes liability only to the extent of the agreed valuation,* even in the case of loss or damage by the negligence of the carrier the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives and of protecting himself against extravagant and fanciful valuation" (our italics).

In Adams Express Co. vs. Croninger, 226 U. S., 491, its first valuation decision under the Carmack Amendment, this Court said:

> "It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage, *to an agreed value made for the purpose of obtaining the lower of two or more rates or charges proportioned to the amount of the risk*" (our italics).

In the more recent case of Boston & Maine R. R. vs. Piper, 246 U. S., 439, this Court by Mr. Justice Day summed upon its holdings in the various cases as follows:

> "The Carmack Amendment requires the initial carrier to issue a bill of lading, and carriers are obliged to carry the articles shipped at the rates fixed in the published tariffs. Many decisions of this Court have held that the carrier may offer to the shipper

and the shipper may be bound by a contract which limits recovery to a valuation declared by the shipper in consideration of the reduced rate for the carriage of the freight. This rule was stated in an early case arising after the passage of the Carmack Amendment (Adams Express Co. vs. Croninger, 226 U. S., 491, 509, 510) and has been frequently reiterated since.

"In the cases in which the recovery for the lesser valuation has been affirmed, the shipper was offered an opportunity to recover a greater sum than the declared value upon paying a higher rate to the carrier. The shipper was offered alternative recoveries based upon different valuations upon the payment of different rates, and was held bound by the one chosen." (Our italics.)

See also The Kensington, 183 U. S., 263.

From the foregoing, it is obvious that the Court of Appeals in the present case merely correctly applied a proposition of law repeatedly passed upon by this Court.

II.

The Court of Appeals correctly interpreted and followed the decision of this court in Reid vs. Fargo, 241 U. S. 544:

Petitioner's counsel rests his entire case upon the case of Reid vs. Fargo, 241 U. S., 544, claiming, as he stated in the courts below that it is "an express adjudication that, by the law as administered in the Federal courts, an agreed valuation

is valid and binding regardless of whether or not the freight rate is based upon the valuation agreed upon."

The record in that case shows that that case is not authority for any such proposition.

The bill of lading in that case (which was not as in the present case, invalidated by the Interstate Commerce Act) provided that the freight was adjusted to the value declared, and also provided an opportunity for the shipper to declare a higher value on the payment of a higher rate. *No proof in contradiction of this statement contained in that bill of lading was offered on the trial of that action* (See Court of Appeals opinion in present case, fol. 143), so that in approving the limited recovery in Reid vs. Fargo, this Court merely followed its holding in Cincinnati, New Orleans and Texas Pacific Ry. vs. Rankin, 241 U. S., 319, i. e., that the uncontradicted statement of the bill of lading was sufficient to sustain the agreed valuation, being prima facie proof that lawful alternate rates based on specific values had been offered to the shipper and that the shipper had made his choice.

It will thus be seen that there is nothing in Reid vs. Fargo which in any conflicts with the other decisions of this Court, to the effect that an agreed value to be valid must be supported by a freight rate based upon it, and the opinion of the New York Court of Appeals (fols. 141-143), shows that that decision of this Court was correctly interpreted and applied in the present case.

It might be well to add that the shipment in Reid vs. Fargo was an ocean shipment moving from London to New York and entirely outside of

the scope of the Interstate Commerce Act. Consequently no question of the binding force of the provisions of filed tariffs and rates was there involved. In the case of an ocean shipment, the carrier is entirely free, except as restrained by business reasons, to change the terms of carriage and the amount of its charge with each shipper and with each shipment.

III.

From the foregoing, it is obvious that this case involves no novel question but merely an application to an everyday state of facts of a principal of law well settled by the decisions of this Court. A reading of the opinion of the Court of Appeals will show conclusively that that Court correctly construed, followed and applied the decisions of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARTHUR W. CLEMENT,
WILSON E. TIPPLE,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 183.

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

against

JAMES J. E. BURKE,

Respondent.

BRIEF FOR RESPONDENT.

ARTHUR W. CLEMENT,
WILSON E. TIPPLE,
Attorneys for Respondent.

PRESS OF PRESCOTT PAPER, 80 Washington Street, New York City.

Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
against
JAMES J. E. BURKE,
Respondent.

BRIEF FOR RESPONDENT.

Statement of Facts.

The respondent desires to add the following to the statement of facts in the petitioner's brief:

1. This shipment at the time of its loss was in interstate commerce moving under a rate, tariff and classification duly filed and established by the defendant under the Interstate Commerce Act (Record, pages 3, 4, 20).

2. The filed rate under which this shipment was then moving was conditioned only upon the use of the Uniform Bill of Lading and not on any release of the amount of the carrier's liability (pages 20, 16, 13). The petitioner's tariffs gave the shipper but one option, i. e., to ship under the Uniform Bill of Lading or at common-law liability (page 13).

I.

The $100 limitation relied upon by the petitioner not a part of the petitioner's interstate tariff under which this shipment moved. It is therefore void and does not limit the petitioner's liability.

This shipment at the time of its loss was moving from San Francisco to New York. It was therefore, interstate commerce, and subject to the provisions of the Interstate Commerce Act.

The rights and liabilities of the parties in the present action must therefore be determined exclusively from the terms of the filed tariff and classification applicable to the rate under which this shipment moved.

First: As to the bill of lading issued in Japan (Exhibit A, pages 7-8) which contains the limitation clause on which the petitioner relies, that bill of lading was not filed by the petitioner as a part of its interstate tariffs. It is therefore inoperative and void so far as this loss is concerned.

Second: The filed rate under which this shipment moved ($1.25 per hundred pounds) is conditioned upon the use of the Uniform Bill of Lading only. The Uniform Bill of Lading therefore becomes the sole bill of lading covering this shipment at the time of its loss. It contains no limitation on the amount of the petitioner's liability except the clause limiting recovery to the invoice price, the amount herein sued for.

Third: The shipment was moving under a duly filed and established rate of $1.25 per hundred

pounds (page 20). The tariffs which, by reason of this rate and the provisions of the Interstate Commerce Act thereby became applicable to this shipment, are set forth in the record (pages 10-20). In none of them is the $100 clause of the ocean bill of lading set forth and none of them show any provision in any way limiting the amount of the petitioner's liability except the tariff provision that had the shipment been valued at more than $900 or more per 40 cubic feet (which it was not) a higher rate would apply and the provision of the Uniform Bill of Lading (page 15) limiting the carrier's liability to the invoice price of the shipment, the very amount sued for in this action. Neither of these limitations are material in the present case.

As the $100 limitation upon which petitioner relies was not a part of the rate and tariff under which this shipment moved at the time of its loss, it follows that it is inapplicable to the present loss and illegal and void and that the amount of respondent's recovery is not in any way limited thereby.

The decisions of this Court are clear that under the Interstate Commerce Act, the filed tariffs must show not only the charge for the services performed but also all regulations which in any way affect the value of the services performed for the charge named.

> Southern Pacific Ry. vs. Prescott, 240 U. S., 632.

Interstate Commerce Act. Sec. 6.

Nothing can be presumed. If a tariff does not expressly provide for a limitation of the value of a shipment, an attempted valuation is void.

The limitation is not permitted merely because the tariff is silent. Thus in Chicago & Alton Ry. vs. Kirby, 225 U. S., 155 an agreement to expedite a shipment although valid at common-law, was held void by this Court because the tariff did not specify such an agreement although it did not in terms forbid it.

II.

The $100 limitation of the bill of lading issued in Japan is not a "value agreed upon" valid under the Interstate Commerce Act.

The petitioner argues that the $100 limitation clause of the bill of lading issued in Japan is enforcible as a "value agreed upon" within the clause of the Uniform Bill of Lading limiting the carrier's liability to the invoice price unless a lower value "has been agreed upon or is determined by the classification or tariffs upon which the rate is based."

In other words, the petitioner contends that section 3 of the Uniform Bill of Lading permits a shipper and a carrier to validly agree upon a valuation for a shipment less than its real value, notwithstanding as we have seen above that the filed tariff and rate under which the shipment moved contained no such limitation.

This construction of the Uniform Bill of Lading is contrary to the whole scheme of the Interstate Commerce Act.

As we have shown under Point I, the Interstate Commerce Act required the carrier to state in a

definite way in its filed schedules everything which in any way affected the value of the services to be performed by it for the rate named. This would include a definite statement by the carrier, in its filed schedule, of the amount of liability to be assumed by the carrier, otherwise it must be conclusively presumed to have agreed to carry shipments without any restriction on the amount of its liability for the shipments' loss.

Having stated in a definite way in its filed tariff, the terms upon which it will perform a service, the Act, as shown by many decisions of this Court, requires that the carrier's responsibility shall be that which it has voluntarily assumed and set forth in its tariff.

If section 3 of the Uniform Bill of Lading is held to permit agreements as to value to be freely entered into by both shipper and carrier although not specified in the tariffs, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the commission. To permit such oral agreements would defeat the primary purpose of the Interstate Commerce Act, so often affirmed in the decisions of this Court which are to require equal treatment of all shippers and the charging of but one rate to all, and that rate the one filed as required by the act (See Atchison Topeka & Santa Fe Ry. vs. Robinson, 233 U. S., 173). The whole scheme of the Interstate Commerce Act requires that for the same rate all parties shall receive from the carriers the same terms, i. e., the regulations named in the filed tariffs and no others.

If the petitioner's contention were sound—that the 3rd paragraph of the Uniform Bill of Lading

permits any and all agreements as to value—then the carriers would have once more acquired absolute freedom in the matter of agreements as to values of shipments and the door would then be open to all the abuses of discriminations and secret agreements which the amended Interstate Commerce Act, was intended to cure. Under such a construction, the favorite large shipper would be sure to get a higher valuation than the small shipper.

Therefore, the "lower value agreed upon" referred to in the Uniform Bill of Lading must be construed to mean a "lower value agreed upon" as *provided by the classification or tariffs upon which the rate is based* and must refer to what is generally known as a "declared value."

This construction of the provision of the Uniform Bill of Lading is confirmed by the provisions of the Western Classification (page 11) which governed the tariff and rate under which this shipment moved (page 16), which Classification (Record, page 11) specifically sets forth that the ratings on certain articles in the Classification are conditions upon "declared" valuations, e. g., household goods, live stock, etc.

As the $100 limitation claimed by plaintiff was not filed in petitioner's schedules it cannot be enforced as a "lower value agreed upon."

It might be added that the provision of the Uniform Bill of Lading gains no immunity from attack by being itself a part of a filed tariff.

Boston & Maine R. R. vs. Piper, 246 U S., 439;

Chicago Milwaukee & St. Paul Ry. vs. McCaull, Dinsmore Co., 251 U. S., 549.

III.

Even if the $100 limitation of the Japanese Bill of Lading be called a "value agreed upon" within the meaning of the uniform bill of lading, nevertheless the $100 limitation would still be void and unenforcible because it is not supported by a difference in freight rates based upon the valuation declared.

Admitting for argument that the $100 limitation of the bill of lading issued in Japan constituted a "lower value agreed upon" by the parties within the meaning of Section 3 of the Uniform Bill of Lading, nevertheless, the clause purporting to limit defendant's liability to $100 per package would be void because it would lack the one absolutely essential element to its validity under all the decisions of the Federal courts, i. e., the freight charge made was not based upon the valuation so declared.

Only one rate was filed and offered by the defendant, i. e., $1.25 per hundred. Whether the shipper at San Francisco had said "my shipment is valued at $500 per package" or "my shipment is valued at $10 per package" defendant's charge could only have been $1.25 per hundred. It was the only legal rate.

The Interstate Commerce Act in no way invalidated the common law rule that a limited liability to be valid must be based upon a difference in the carrier's rates. It only added the additional element that this difference must appear in the filed rates and the provision for the valuation to be valid must appear in the carrier's filed schedules.

Adams Express Co. vs. Croninger, 226 U. S., 491.

It is a fixed requirement of all the Federal decisions that an "agreed valuation" to be valid must be supported by a freight rate based upon it, or in other words, the shipper must have obtained a lower freight rate in consideration of agreeing to the limited valuation of his shipment.

This thought runs through all the Federal decisions. Thus in the leading case of Hart vs. Penn. R. R. Co., 112 U. S., 331, this Court stated the basis of its holding as follows:

> "The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in the case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives and of protecting himself against extravagant and fanciful valuation."

In Adams Express Co. vs. Croninger, 226 U. S., 491, its first valuation decision under the Carmack Amendment, this Court said:

> "It has therefore become an established rule of the common law as declared by this Court

> In many cases, that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage, to an agreed value *made for the purpose of obtaining the lower of two or more rates*, or charges proportioned to the amount of the risk." • • •
>
> "Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value *for the purpose of adjusting the rate* conflict with any sound principal of public policy. *The reason for the legality of such agreements is well stated in Hart* vs. *Penn. R. R. Co.*, 112 U. S., 331." (Our italics.)

The most recent case is Boston & Maine R. R. vs. Piper, 246 U. S., 439, where the Court, by Mr. Justice Day, summed up its holdings in the various cases as follows:

> "In the cases in which the recovery for the lesser valuation has been affirmed, the shipper was offered an opportunity to recover a greater sum than the declared value upon paying a higher rate to the carrier. The shipper was offered alternative recoveries based upon different valuations upon the payment of different rates, and was held bound by the one chosen."

In the Kensington, 183 U. S., 263, the question involved was the right of an ocean steamer to limit

its liability for the passenger's baggage to 250 francs. The shipping ticket provided that passengers could not increase the amount of the carrier's liability above 250 francs except upon conditions which this Court held were illegal. This Court, in an opinion by Mr. Justice (now Chief Justice) White, refused to limit the passenger's recovery, saying:

> "We think the arbitrary limitation of 250 francs to each passenger unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment is void."

And so we find through all the decisions of this Court, the distinct requirement that the charges made must be based on the valuation fixed by the bill of lading, or, in other words, it must be shown (1) that the shipper, by declaring the lower value, obtained a lower rate than the carrier would have been legally entitled to charge if the shipper had declared the true value of his property, and (2) that the carrier would have been legally entitled to make a higher charge if the shipper had declared the full value of his property.

Applying this well established principle to this present case, it will be seen that the $100 limitation of the Japanese bill of lading is, so far as this interstate transportation is concerned, absolutely void and unenforcible, because as there was but one legal rate, i. e., the filed rate of $1.25 per hundred, the shipper did not, and could not, have obtained a lower charge by declaring a value of $100 per package, and the carrier could not have made

or obtained a higher charge if the shipper had declared the full value of his property.

There was only one filed rate, and no machinery was provided whereby the shipper could compel the carrier to accept a shipment at the shipper's own valuation.

In other words, there can be no claim of fraud, no basis for an estoppel, and there can be no consideration for any claim of a contract.

Nor can the limitation be upheld on any theory of waiver because neither the shipper or carrier can waive any provision of the filed tariffs, and there is no consideration for a waiver.

Nor can any fancied consideration be made out of the statement of defendant's tariffs that ten per cent. additional charge would be made unless the uniform bill of lading was used.

The basis of that additional charge of ten per cent. is the use or non-use of the uniform bill of lading, in other words whether the defendant is to carry at the common-law liability of an insurer or under the limited liability of the uniform bill of lading (record, page 13).

This additional charge of ten per cent. has nothing to do with the question of the valuation of a shipment, as will be seen if we assume two shipments, each made under the uniform bill of lading, both moving from San Francisco to New York, one at a valuation of $500 per package, the other at a valuation of $100 per package. In both cases defendant's charge would be, and would have to be, the same, $1.25 per hundred pounds.

IV.

The case of Reid vs. Fargo, 241 U. S., 544, in no way reversed or modified the previous holdings of the Court.

Petitioner's counsel in effect rests his entire case upon the case of Reid vs. Fargo, 241 U. S., 544, claiming that it is "an express adjudication that, by the law as administered in the Federal Courts an agreed valuation is valid and binding regardless of whether or not the freight rate is based upon the valuation agreed upon."

Counsel is mistaken. The Reid case is not authority for this proposition and in no way modified the previous decisions of this Court.

The Reid case involved an ocean shipment of an automobile moving from London to New York and was in no way subject to the Interstate Commerce Act, and the ocean carrier and the shipper were not as in the present case restricted by filed tariffs and were entirely free to enter into any agreement that they felt desirable.

The bill of lading in the Reid case specifically provided:

> "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100 or its equivalent in English currency, on which basis the freight is adjusted and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared and stated herein, and extra freight as may be agreed on paid."

And there was no proof in that case off-setting the express terms of the bill of lading, that an ex-

tra charge would be made, if an extra value was declared.

An examination of the record of the trial in that case shows that the only witness examined on this point was the general traffic agent of the American Express Company at London, who was not an official of the ocean carrier and who was merely testifying from his knowledge based upon his experience in dealing with ocean carriers. That he was not qualified to testify as to what the ocean carrier would have done had the full value of the automobile in question been declared was shown by his frank statement that "the value of an automobile is never furnished to a steamship line and in my experience they have never been notified of the value of an automobile shipped." As his whole testimony was based on his experience and by his own admission he had no experience, it will be seen that he was not qualified to testify that if the full value of the automobile had been declared the rate would have been the same and that "no extra freight would have been asked by the carrier" and as his testimony was the only evidence, there was no proof to offset the statement of the bill of lading that an additional charge would be made.

While it is true that he tried to testify that if the full value of the automobile had been declared, the rate would have been the same, that was true only, as he explained because there were two bases of freight, one on value and one on measurement, and the carrier always charged the higher of the two and the witness testified that in this instance the measurement rate would have exceeded the valuation rate.

On the question of difference in rates, a sheet of ocean freight rates was offered in evidence, and that

sheet specifically provided that "weight, cold storage, automobiles and ad valorem shipments must be specially arranged."

It may also be well to recall in this connection that the rate sheet of an ocean carrier is little more than an invitation to do business and has not the binding force of a filed interstate tariff. The ocean carrier except for business reasons is free to change its rates with each shipment and each shipper.

The limitation in the Reid case was undoubtedly upheld by this Court under the principle that where a bill of lading, duly delivered and accepted, declares as did that bill of lading that lawful alternate rates based on specified values were offered, such declaration is sufficient prima facie evidence of choice, to support the limitation.

Cincinnati, New Orleans & Texas Pacific Ry. Co. vs. Rankin, 241 U. S., 319.

In the present case we have definite and incontrovertible proof that no such difference of rates existed.

V.

The defendant could have inserted the limitation in its filed tariff.

The respondent plays for sympathy by erroneously stating that Yokohama, the original point of shipment was "the only point on the entire transit at which the shipper and the carriers could possibly make any agreements as to value" notwithstanding that the alleged agreement in the present

case was only a printed figure in a bill of lading.

Respondent's statement ignores the entire scheme of the Interstate Commerce Act which has provided machinery to meet just the situation presented by this shipment. The alleged value of $100 per package is only a *printed* figure on a bill of lading form. Under the Act, the defendant had only to play fair, and file as a part of its interstate tariffs a provision providing for a valuation of $100 per package and making provisions for higher rates proportioned to higher valuation and the courts would hold and have repeatedly held that the very act of shipping under that rate and tariff would constitute a valid agreement as to value even where no bill of lading had in fact been issued.

> Boston & Maine R. R. vs. Hooker, 233 U. S., 97.

When the carrier in making up its rate ignored in its tariff-provision any reference to value, it showed conclusively that the question of the value of the shipment made under that rate was one that it was not interested in at all and that it was prepared to carry shipments under that tariff entirely without reference to whether they were of greater value or of smaller value, and it is fair to assume that it fixed the amount of its charge with reference to any additional risk that that involved. It is therefore entirely illogical and unfair to allow a carrier who before the loss voluntarily went on record as willing to ignore the element of value of shipments to insist after the loss that it must have the benefit of a limitation as to value.

It can be confidently stated that any value placed on this shipment in the printed form of the unfiled

ocean bill of lading in no way influenced the petitioner with respect to the care which it gave this shipment. In fact there is no reason to believe that the petitioner even knew of the existence of this $100 clause in the ocean bill of lading until after this loss had occurred.

VI.

The natural place for provisions limiting the values of shipments is in the tariff.

The defendant further argues that it should have the benefit of the $100 provision of the ocean bill of lading because "the natural method of expressing such an agreement is in the bill of lading" and also urges that "agreed valuations are usually stated in the bill of lading either in the printed clauses or by an endorsement by rubber stamp or in handwriting."

The many decisions of this Court since the passage of the Carmack Amendment show that the "natural place" and the only place for an agreed valuation provision such as this is claimed to be is in the carrier's filed tariffs and that an endorsement on a bill of lading not in accordance with a filed tariff is absolutely void.

In the case of D'Utassy vs. Southern Pacific Co. 250 U. S., 639, this Court declined to review a decision of the New York Court of Appeals holding void a request endorsed on a bill of lading because the terms of that endorsement were not set forth in the carrier's tariff.

The whole scheme of the Interstate Commerce Act requires that valuation provisions be stated in the filed tariffs and not left to individual contracts and the "natural place" for such agreements is therefore in the tariff and nowhere else.

VII.

The judgment of the New York Court of Appeals should be affirmed.

All of which is respectfully submitted,

ARTHUR W. CLEMENT,
WILSON E. TIPPLE,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 183.—October Term, 1920.

Union Pacific Railroad Company, Petitioner,
vs.
James J. E. Burke.

On Writ of Certiorari to the Supreme Court of the State of New York.

[February 28, 1921.]

Mr. Justice Clarke delivered the opinion of the Court.

On March 10, 1915, S. Ontra & Brother delivered to the Pacific Mail Steamship Company at Yokohama, Japan, 56 cases of "Drawn work goods and Renaissance," consigned to their own order at New York, and received a bill of lading for ocean transportation to San Francisco and thence by the Southern Pacific Company and its connections, by rail, to destination. The property was delivered to the Southern Pacific Company and without new billing was carried to a junction with the line of the petitioner, the Union Pacific Railroad Company, and while in its custody was totally destroyed in a collision. The respondent, successor in interest to the consignor, claimed in this suit the right to recover the fair invoice value of the goods, $17,449.01, and the petitioner conceded his right to recover, but only to the amount of the agreed valuation of $100 per package, $5,600, to which it contended he was limited by the bill of lading. All of the facts are stipulated or proved by undisputed evidence.

The Appellate Division—First Department New York Supreme Court—rendered judgment in favor of respondent for $5,600, with interest and costs, but on appeal to the Court of Appeals of that State the judgment of the Appellate Division was reversed and an order was entered that a judgment should be rendered by the Supreme Court in favor of respondent for $17,449.01, with interest and costs. The case is brought here on certiorari.

On the face of the bill of lading received at Yokohama was the notation: "Weight 26,404 lbs.; Ocean weight rate, 50¢, Freight

$132.02. Rail, minimum carload weight 30,000 lbs, wght rate $1.25, Freight $375.00." (Thus the ocean and rail rates are separately stated, and the latter is $1.25 per 100 lbs., minimum carload.) On the back of the bill of lading were printed thirty-one conditions, the thirteenth of which contained the provision that

"It is expressly agreed that the goods named in this bill of lading are hereby valued at not exceeding $100 per package . . and the liability of the Companies therefor in case of the total loss of all or any of the said goods from any cause shall not exceed $100 per package."

The petitioner was an interstate common carrier by rail at the time of the shipment involved and as such had filed with the Interstate Commerce Commission schedules of rates and regulations under which the property was moving at the time it was destroyed. By these schedules the carrier was bound, and to them it was limited, in contracting for traffic (*Southern Railway* v. *Prescott*, 240 U. S. 632, 638). The statute expressly provided that it should not charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than such as was specified in such schedules. (34 Stat. 587, Section 6.)

In these schedules was included a rule, designated as Rule 9A, which reads:

"Unless otherwise provided, when property is transported subject to the provisions of the Western Classification, the acceptance and use are required, respectively, of the 'Uniform Bill of Lading', 'Straight' or 'Order' as shown on pages 87 to 90, inclusive."

For the purposes of this case, only, it is admitted, and accepted by this Court, that this rule 9A permitted and required that the property should be treated as moving east of San Francisco under the Uniform Bill of Lading, although, in fact, no other than the Yokohama bill of lading was issued. This Uniform Bill of Lading contained, among other conditions, the following:

"*The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property* (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, *unless a lower value* has been represented in writing by the shipper *or has been agreed upon* or is determined by the classification or tariffs upon which the rate is based, in

any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence."

Upon the facts thus stated the petitioner contends that the agreed valuation of $100 per package or case in the Yokohama bill of lading is necessarily imported into the Uniform Bill of Lading, becomes the valuation "agreed upon" within the terms and conditions quoted from that bill, and limits the respondent's recovery to that amount,-$5,600, regardless of the value of the property and of the fact that it was lost by the carrier's negligence.

To this contention it is replied by the respondent: that it is admitted by the petitioner that its filed and published schedules contained but one rate applicable to the shipment as it was carried east of San Francisco; that that rate, $1.25 per 100 pounds minimum carload, was charged in the Yokohama bill of lading; and that, since no choice of rates was given, or could be given, to the shipper, any agreement, in form a valuation of the property, made for the purpose of limiting the carrier's liability to less than the real value thereof, in case of loss by negligence, was void and without effect.

In many cases, from the decision in *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331, decided in 1884, to *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, decided in 1917, it has been declared to be the settled Federal law that if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice, understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property.

As a matter of legal distinction, estoppel is made the basis of this ruling—that, having accepted the benefit of the lower rate, in common honesty the shipper may not repudiate the conditions on which it was obtained—but the rule and the effect of it are clearly established.

The petitioner admits all this, but contends that it has never been held by this court that such choice of rates was essential to the validity of valuation agreements, and, arguing that they should be sustained unless shown to have been fraudulently or oppressively obtained, it affirms the validity of the agreement in

the Yokohama bill of lading, and cites as a decisive authority *Reid* v. *American Express Co.*, 241 U. S. 544.

With this contention we cannot agree.

This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338 and 246 U. S. 439, 444, *supra*), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given—where "the rate was tied to the release". Thus, in the *Hart* case (p. 343), it is said:

"The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

And in the *Piper* case it is said (p. 444):

"In the previous decisions of this Court upon that subject it has been said that the limited valuation for which a recovery may be had does not permit the carrier to defeat recovery because of losses arising from his own negligence, but serves to fix the amount of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service."

The *Reid* case, *supra*, does not conflict with these decisions, for in that case the bill of lading containing the undervaluation, which was there sustained, expressly recited that the freight was adjusted on the basis of the agreed value and that the carrier's liability should not exceed that sum "unless a value in excess thereof be specifically declared and stated herein and extra freight as may be agreed upon be paid." The bill of lading was for ocean carriage only, London to New York, to which, of course, the Interstate Commerce Act was not applicable, (36 Stat. 544, Section 1; *Armour Packing Company* v. *United States*, 209 U. S. 56, 78; *Cosmopolitan Shipping Company* v. *Hamburg-American Packet Company, et al.*, 13 I. C. C. Rep. 266) and the carrier, therefore,

was in a position to tender to, and, by the quoted provision of the bill, did tender to, the shipper the choice of paying a higher rate and being subject to less restricted recovery in case of loss. The case was plainly within the scope of the prior decisions of this court upon the subject.

Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception. Having but one applicable published rate east of San Francisco the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the Yokohama bill of lading, even if treated as imported into the Uniform Bill of Lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law. To allow the contention of the petitioner, would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating privilege. Obviously such agreements could be made, only with the ignorant, the unwary or with persons deliberately deceived. It results that the judgment of the Supreme Court of the State of New York, entered upon the order of the Court of Appeals of that State, must be

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.